Mahadzir bin Yusof & Anor v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO J-05–39 OF 2008
ZAINUN ALI, HASAN LAH AND MOHD HISHAMUDIN JJCA
16 MARCH 2010

Criminal Procedure — Accomplice — Whether witness an accomplice — Burden on prosecution to establish beyond reasonable doubt that witness not accomplice — Principles in Harcharan Singh & Anor v Public Prosecutor [2005] 1 MLJ 593 — Requirement for evidence of accomplice to be corroborated — Effect of trial judge failing to warn himself of danger of convicting accused based on uncorroborated evidence of accomplice

Criminal Law — Murder — Defence — Self defence — Injuries on deceased inflicted numerous times using full force — Whether defence proven

Criminal Law — Murder — Grave and sudden provocation — Injuries on deceased inflicted numerous times using full force — Whether defence proven

Criminal Law — Penal Code — ss 34, 302 — Murder and common intention — Ingredients to be proven to attract principle of joint liability under s 34 — Whether element of common intention proven — Whether appellants had consensus to commit murder

Criminal Law — Penal Code — s 302 — Murder — Ingredients to be proven to sustain conviction under s 302 — Whether proven — Appellants causing injuries on vital parts of deceased's body with deadly weapon — Whether amounted to evidence of intention to cause death — Whether murder weapon found — Whether prosecution case established beyond reasonable doubt — Penal Code ss 300(a), (c) & 302

Evidence — Accomplice — Whether witness an accomplice — Burden on prosecution to establish beyond reasonable doubt that witness not accomplice — Principles in Harcharan Singh & Anor v Public Prosecutor [2005] 1 MLJ 593 — Requirement for evidence of accomplice to be corroborated

Evidence — Corroboration — Accomplice, evidence of — Requirement for corroborative evidence — Effect of trial judge failing to warn himself of danger of convicting accused based on uncorroborated evidence of accomplice

Evidence — Relevancy — Evidence of subsequent conduct

One Ibrahim ('PW9') testified that both the appellants sought his help to retrieve monies owed them by one Azley ('the deceased'). As planned, the appellants arranged to meet the deceased at PW9's drinks stall on the pretext that they required the deceased's help to retrieve some stolen television sets which they said they had hidden at a particular spot. All four of them then travelled in the deceased's car to the spot. At the spot, PW9 told the deceased that the actual reason they were there was to collect from him monies owing to the appellants. PW9 testified that at that time he saw the second appellant swinging a wooden baseball bat on the deceased's head. PW9 tried to prevent the blow but the bat hit both his hand and the deceased's head. PW9 then saw the first appellant assaulting the deceased with a *parang* whilst the second appellant hit the deceased with the wooden baseball bat. He saw them assaulting the deceased about five to six times. The deceased's head was by then covered in blood. When the deceased fell and was practically immobile, PW9 and the appellants fled from the scene in the deceased's car. A week later, the first appellant asked PW9 to drive the deceased's car to Rengit, Batu Pahat to sell some stolen computers. While at Rengit, all three of them were arrested by the police. In their defence, the appellants claimed that it was the deceased who had first hit PW9 with the baseball bat causing PW9 to fall down. The first appellant testified that while PW9 and the deceased were struggling on the ground, the first appellant had only looked on but did not do anything. According to the first appellant, the deceased then stood up and ran to the driver's seat, took out the *parang* and attacked the second appellant with the *parang* but the second appellant managed to avoid the blows. The defence claimed that the second appellant hit the deceased twice with the bat and had punched the deceased on his right eye causing the deceased to fall. The appellants had then thrown the baseball bat and the *parang* into a river. The appellants were charged with the murder of the deceased, an offence punishable under s 302 of the Penal Code ('Code') read with s 34 of the Code. The learned trial judge was of the view that PW9 was not an accomplice. The trial judge found that both the appellants had failed to establish the defence of self defence and of grave and sudden provocation and held that the prosecution had proven its case beyond reasonable doubt. Hence, this appeal by the appellants.

Held, dismissing the appeal:

(1) (per **Zainun Ali JCA**) To sustain a conviction punishable under s 302 of the Code, the following ingredients had to be established against the accused: (a) that Azley was dead; (b) that Azley died as a result of injuries sustained by him; (c) that the injuries of Azley were caused by or were the results of the acts of the appellants; and (d) that in inflicting those injuries upon Azley, the appellants either: (i) caused them with the intention of causing the death on Azley; or (ii) caused them with the intention of

causing such bodily injuries on Azley as the appellants knew to be likely to cause death; or (iii) caused them with the intention of causing bodily injuries on Azley and such bodily injuries intended to be inflicted were sufficient in the ordinary course of nature to cause death; or (iv) committed the acts that were imminently dangerous that they must in all probability cause death or such bodily injuries as are likely to cause death (see para 47).

(2) (per **Zainun Ali JCA**) Azley was dead. The post mortem examination showed that he sustained head injury which was attributed to his sudden demise and that the wooden baseball bat was the blunt force that caused the skull to crack. The acts of causing the injuries on the vital parts of the deceased's body with the deadly weapon was evidence of the intention of the appellants to cause his death, thus attracting s 300(a) of the Code (see paras 50(d), 82–83 & 132(d)).

(3) (per **Zainun Ali JCA**) When considering s 300(c) of the Code, the court must decide four matters, namely: (a) what was the bodily injury that was present; (b) what was the nature of the injury; (c) was the injury sufficient in the ordinary course of nature to cause death; (d) did the accused intentionally cause the injury? The items (a)–(c) are all objective inquiries whilst item (d) is a subjective inquiry. The deceased sustained injuries most prominently on the head. These injuries were fatal injuries and caused by the wooden baseball bat. It was clear that the appellants had intentionally caused the fatal injuries on the dangerous or vital spot of the deceased's body. Thus, s 300(c) of the Code had been fulfilled (see paras 84–86 & 88).

(4) (per **Zainun Ali JCA**) After the commission of the crime at the scene of crime, the appellants came back half an hour later to ascertain whether the deceased was dead. After they confirmed that he did not move and was truly dead, they ran away and were missing until they were arrested later. These subsequent conducts of the appellants were relevant under s 8 of the Evidence Act 1950 (see para 93).

(5) (per **Zainun Ali JCA**) The facts and circumstances of the case clearly showed the element of common intention among the appellants. They had consensus to commit the crime as they participated in doing the act or acts in furtherance of the common intention under s 34 of the Code. To attract the principle of joint liability under s 34, there should be: (a) some criminal act; (b) which is done by more than one person; (c) which criminal act is done by such persons; (d) the common intention is in the sense of a pre-arranged plan between such persons; (e) there is participation in some manner in the act constituting the offence by the persons sought to be prosecuted; and (f) there is physical presence at the time of commission of crime of all the persons; but physical presence of all is not necessary in some cases (see paras 97 & 102).

(6) (per **Zainun Ali JCA**) The evidence clearly showed the cause of death was due to a blunt object possibly the wooden baseball bat which was never recovered. However, this did not mean that without the murder weapon, an otherwise solid case will result in acquittal. The evidence was overwhelming that the said wooden baseball bat was the cause of death of the deceased (see para 119). A B

(7) (per **Zainun Ali JCA**) Looking at the injuries sustained by the deceased which were inflicted not once but numerous times using full force, it could not be said that both the appellants were acting in self defence. They had clearly gone beyond what was permissible even if they were made in self defence. Both the appellants had also failed to establish the defence of grave and sudden provocation (see paras 138 & 147). C

(8) (per **Mohd Hishamudin JCA**) The burden of proof is on the prosecution to establish beyond reasonable doubt that PW9 was not an accomplice. Applying the principles as enunciated in *Harcharan Singh & Anor v Public Prosecutor* [2005] 1 MLJ 593 to the present facts, PW9 was an accomplice of the accused (see para 179). D

(9) (per **Mohd Hishamudin JCA**) The evidence of an accomplice must be corroborated in some material particulars by the evidence of independent witness(es). The corroborative evidence must also implicate the accused directly or indirectly with the particular crime in question. If the evidence of the accomplice is not corroborated, the trial judge can still convict the accused but before doing so, the trial judge must warn himself of the danger of convicting the accused based on the uncorroborated evidence of an accomplice (see paras 182, 184 & 187). E F

(10)(per **Mohd Hishamudin JCA**) A conviction must be quashed on appeal if the trial judge fails to warn himself of the danger of convicting an accused on the uncorroborated evidence of an accomplice. However, an appellate court may still uphold a conviction even if the trial judge fails to warn himself of the danger of convicting an accused based on the evidence of an accomplice, where such failure was due to the fact that the trial judge had mistakenly thought that the key witness in question was not an accomplice (and therefore the need for corroborative evidence does not arise), if the appellate court is satisfied that in fact and in law there is evidence that corroborates the evidence of the accomplice which is of such a convincing, cogent and irresistible character (see para 188). G H

(11)(per **Mohd Hishamudin JCA**) There were independent evidence that corroborated the evidence of PW9 in material aspects (see para 199). I

(12)(per **Mohd Hishamudin JCA**) There was common intention within the meaning of s 34 of the Code. There was circumstantial evidence of a common intention to seriously injure the deceased with a baseball club

and a *parang*. The appellants came to the spot well prepared to seriously injure the deceased with a baseball club and a *parang* (see para 213).

(13)(per **Mohd Hishamudin JCA**) That the acts of the appellants in brutally attacking the deceased with the baseball club and *parang* were done with the intention of causing serious bodily injuries to the deceased was beyond doubt. The learned trial judge made a correct finding that the mens rea of the appellants fell within s 300(c) of the Code (see para 216).

(14)(per **Mohd Hishamudin JCA**) The legal burden of proof was on the appellants to satisfy the court on a balance of probabilities that they were entitled to rely on Exception 2 of s 300 of the Code. As to the standard of proof, the appellants have to satisfy the court. The defence had failed to establish the defence of right of private defence under Exception 2 of s 300 (see paras 232 & 236).

[Bahasa Malaysia summary

Ibrahim ('PW9') telah memberi keterangan bahawa kedua-dua perayu telah meminta bantuannya untuk mendapat balik wang yang dihutang oleh Azley ('si mati'). Seperti dirancang, perayu-perayu telah mengatur untuk berjumpa dengan si mati di gerai minuman PW9 dengan helah yang mereka memerlukan bantuan si mati untuk mendapatkan semula beberapa set televisyen yang telah dicuri yang dikatakan telah disembunyikan oleh mereka di satu tempat tertentu. Di tempat itu, PW9 telah memberitahu si mati bahawa sebab sebenar mereka berada di situ adalah untuk mengutip wang hutangnya kepada perayu-perayu. PW9 memberi keterangan bahawa pada masa itu dia melihat perayu kedua menghayun sebatang kayu pemukul besbol di kepala si mati. PW9 telah cuba mengelak hayunan itu tetapi kayu pemukul itu terkena kedua-dua belah tangannya dan kepala si mati. PW9 kemudian melihat perayu pertama menyerang si mati dengan parang manakala perayu kedua memukul si mati dengan kayu pemukul besbol itu. Dia melihat mereka memukul si mati lebih kurang lima hingga enam kali. Kepala si mati pada masa itu telah berlumuran dengan darah. Apabila si mati jatuh dan tidak bergerak, PW9 dan perayu-perayu melarikan diri dari tempat kejadian dengan kereta si mati. Seminggu kemudian, perayu pertama meminta PW9 memandu kereta si mati ke Rengit, Batu Pahat untuk menjual beberapa komponen yang dicuri. Semasa di Rengit, ketiga-tiga mereka telah ditangkap oleh polis. Dalam pembelaan mereka, perayu-perayu mendakwa bahawa si mati yang terlebih dahulu memukul PW9 dengan kayu pemukul besbol dan menyebabkan PW9 terjatuh. Perayu pertama memberi keterangan bahawa semasa PW9 dan si mati bergelut atas tanah, perayu pertama hanya melihat dan tidak berbuat apa-apa. Menurut perayu pertama, si mati kemudian berdiri dan lari ke tempat duduk pemandu, mengeluarkan parang dan menyerang perayu kedua dengan parang itu tetapi perayu kedua dapat mengelak serangan tersebut. Pembelaan mendakwa bahawa perayu kedua telah memukul si mati sebanyak dua kali dengan kayu pemukul itu dan menumbuk si mati di mata kanannya

menyebabkan si mati jatuh. Perayu-perayu kemudian telah membuang kayu pemukul besbol dan parang itu ke dalam sungai. Perayu-perayu telah dituduh membunuh si mati, satu kesalahan yang boleh dihukum di bawah s 302 Kanun Keseksaan ('Kanun') dibaca bersama s 34 Kanun itu. Hakim bicara yang bijaksana berpendapat bahawa PW9 bukan rakan sejenayah. Hakim bicara mendapati bahawa kedua-dua perayu telah gagal membuktikan pembelaan membela diri dan provokasi serius dan tiba-tiba dan memutuskan bahawa pendakwaan telah membuktikan kesnya melampaui keraguan munasabah. Justeru itu, rayuan ini oleh perayu-perayu.

Diputuskan, menolak rayuan:

(1) (oleh **Zainun Ali HMR**) Untuk mengekalkan sabitan yang boleh dihukum di bawah s 302 Kanun, faktor-faktor berikut perlu dibuktikan terhadap tertuduh: (a) bahawa Azley telah mati; (b) bahawa Azley telah mati akibat kecederaan yang dialaminya; (c) bahawa kecederaan Azley telah disebabkan oleh atau adalah akibat tindakan-tindakan perayu-perayu; dan (d) bahawa dalam menyebabkan kecederaan tersebut ke atas Azley, perayu-perayu sama ada: (i) telah menyebabkannya dengan niat untuk menyebabkan kematian Azley; atau (ii) menyebabkannya dengan niat menyebabkan kecederaan badan ke atas Azley kerana perayu-perayu mengetahui ia berkemungkinan menyebabkan kematian; atau (iii) menyebabkannya dengan niat menyebabkan kecederaan badan ke atas Azley dan kecederaan badan sedemikian dengan niat menyebabkannya adalah memadai dalam keadaan biasa menyebabkan kematian; atau (d) melakukan tindakan-tindakan yang amat bahaya bahawa mereka hendaklah dalam segala kemungkinan menyebabkan kematian atau kecederaan badan yang berkemungkinan menyebabkan kematian (lihat perenggan 47).

(2) (oleh **Zainun Ali HMR**) Azley telah mati. Pemeriksaan bedah siasat menunjukkan bahawa dia mengalami kecederaan kepala yang menyebabkan kematiannya secara tiba-tiba dan bahawa kayu pemukul besbol itu merupakan kuasa tumpul yang menyebabkan tengkorak retak. Tindakan-tindakan menyebabkan kecederaan-kecederaan pada bahagian penting badan si mati dengan senjata berbahaya adalah bukti niat perayu-perayu untuk menyebabkan kematiannya, dengan itu menarik penggunaan s 300(a) Kanun (lihat perenggan 50(d), 82–83 & 132(d)).

(3) (oleh **Zainun Ali HMR**) Apabila mengambilkira s 300(c) Kanun, mahkamah hendaklah memutuskan empat perkara, iaitu: (a) apakah kecederaan badan yang wujud; (b) apakah sifat kecederaan itu; (c) adakah kecederaan itu memadai dalam keadaan biasa sifat yang menyebabkan kematian; (d) adakah tertuduh berniat menyebabkan kecederaan? Item (1)–(3) adalah kesemuanya soalan objektif manakala item (d) adalah

soalan subjektif. Si mati mengalami kecederaan dengan ketara di bahagian kepala. Kecederaan-kecederaan tersebut merupakan kecederaan membawa maut dan disebabkan oleh kayu pemukul besbol. Adalah jelas bahawa perayu-perayu berniat menyebabkan kecederaan-kecederaan membawa maut pada bahagian bahaya atau penting si mati. Oleh itu, s 300(c) Kanun telah dipenuhi (lihat perenggan 84–86 & 88).

(4) (oleh **Zainun Ali HMR**) Selepas melakukan jenayah di tempat kejadian jenayah, perayu-perayu telah kembali setengah jam kemudian untuk memastikan sama ada si mati telah mati. Setelah mereka mengesahkan bahawa dia tidak bergerak dan memang telah mati, mereka telah melarikan diri dan hilang sehingga mereka ditangkap kemudiannya. Perlakuan perayu-perayu selepas kejadian itu adalah relevan di bawah s 8 Akta Keterangan 1950 (lihat perenggan 93).

(5) (oleh **Zainun Ali HMR**) Fakta dan keadaan kes jelas menunjukkan elemen niat bersama antara perayu-perayu. Mereka mempunyai konsensus untuk melakukan jenayah kerana mereka terlibat dalam melakukan tindakan atau tindakan-tindakan untuk melanjutkan niat bersama di bawah s 34 Kanun. Untuk menarik prinsip-prinsip liabiliti bersama di bawah s 34, perlu wujud: (a) beberapa tindakan jenayah; (b) yang dilakukan oleh lebih daripada seorang; (c) yang mana tindakan jenayah dilakukan oleh mereka tersebut; (d) niat bersama yang bersifat rancangan yang telah diatur terlebih dahulu antara mereka tersebut; (e) terdapat penglibatan dalam cara tindakan yang membentuk kesalahan oleh mereka yang memohon didakwa; dan (f) terdapat kehadiran fizikal pada masa jenayah dilakukan oleh mereka semua; tetapi kehadiran fizikal kesemuanya tidak perlu dalam kes-kes tertentu (lihat perenggan 97 & 102).

(6) (oleh **Zainun Ali HMR**) Keterangan jelas menunjukkan bahawa sebab kematian adalah akibat objek tumpul yang kemungkinannya adalah kayu pemukul besbol yang tidak pernah dijumpai. Walau bagaimanapun, ini tidak bermakna tanpa senjata pembunuhan, jika sebaliknya kes yang kukuh akan mengakibatkan pelepasan. Keterangan amat jelas bahawa kayu pemukul besbol adalah sebab kematian si mati (lihat perenggan 119).

(7) (oleh **Zainun Ali HMR**) Melihat kecederaan-kecederaan yang dialami oleh si mati yang dilakukan bukan sekali tetapi beberapa kali menggunakan kuasa penuh, ia tidak boleh dikatakan bahawa kedua-dua perayu bertindak membela diri. Mereka jelas telah melampaui apa yang dibenarkan jikapun dibuat demi membela diri. Kedua-dua perayu juga telah gagal untuk membuktikan pembelaan provokasi serius dan tiba-tiba (lihat perenggan 138 & 147).

(8) (oleh **Mohd Hishamudin HMR**) Beban bukti terletak pada pendakwaan untuk membuktikan melampaui keraguan munasabah bahawa PW9 bukan rakan sejenayah. Dengan menggunakan prinsip-prinsip sepertimana diputuskan dalam kes *Harcharan Singh & Anor v Public Prosecutor* [2005] 1 MLJ 593 kepada fakta-fakta ini, PW9 merupakan rakan sejenayah tertuduh (lihat perenggan 179).

(9) (oleh **Mohd Hishamudin HMR**) Keterangan rakan sejenayah hendaklah disokong dalam beberapa butiran-butiran penting oleh keterangan saksi-saksi berasingan. Keterangan sokongan juga hendaklah membabitkan tertuduh secara langsung atau tidak langsung dengan jenayah tertentu yang dipersoalkan. Jika keterangan rakan sejenayah tidak disokong, hakim bicara masih boleh mensabitkan tertuduh tetapi sebelum berbuat demikian, hakim bicara hendaklah memberi amaran terhadap diri beliau tentang mensabitkan tertuduh berdasarkan keterangan rakan sejenayah yang tidak disokong (lihat perenggan 182, 184 & 187).

(10)(oleh **Mohd Hishamudin HMR**) Sabitan hendaklah dibatalkan atas rayuan jika hakim bicara gagal memberi amaran terhadap diri beliau tentang bahaya mensabitkan tertuduh atas keterangan rakan sejenayah yang tidak disokong. Walau bagaimanapun, Mahkamah Rayuan masih boleh mengekalkan sabitan itu meskipun hakim bicara gagal memberi amaran terhadap diri beliau tentang mensabitkan tertuduh berdasarkan keterangan rakan sejenayah, di mana kegagalan sebegitu adalah akibat hakikat hakim perbicaraan yang silap memikirkan bahawa saksi utama yang dipersoalkan bukan rakan sejenayah (dan oleh itu keperluan keterangan sokongan tidak timbul), jika Mahkamah Rayuan berpuas hati bahawa dari segi fakta dan undang-undang terdapat keterangan yang menyokong keterangan rakan sejenayah yang bersifat meyakinkan dan tidak dapat disangkal (lihat perenggan 188).

(11)(oleh **Mohd Hishamudin HMR**) Terdapat keterangan berasingan yang menyokong keterangan PW9 dalam aspek-aspek penting (lihat perenggan 199).

(12)(oleh **Mohd Hishamudin HMR**) Terdapat niat bersama dalam maksud s 34 Kanun. Terdapat keterangan mengikut keadaan tentang niat bersama untuk mencederakan si mati dengan teruk dengan kayu pemukul besbol dan parang. Perayu-perayu tiba di tempat kejadian bersedia untuk mencederakan si mati dengan teruk dengan kayu pemukul besbol dan parang (lihat perenggan 213).

(13)(oleh **Mohd Hishamudin HMR**) Bahawa tindakan perayu-perayu yang dengan kejam menyerang si mati dengan kayu pemukul besbol dan parang telah dilakukan dengan niat menyebabkan kecederaan-kecederaan badan yang serius terhadap si mati adalah

melampaui keraguan. Hakim perbicaraan yang bijaksana telah membuat penemuan yang betul bahawa mens rea perayu-perayu terangkum dalam s 300(c) Kanun (lihat perenggan 216).

(14)(oleh **Mohd Hishamudin HMR**) Beban bukti sah terletak pada perayu-perayu untuk meyakinkan mahkamah atas imbangan kebarangkalian bahawa mereka berhak untuk bergantung kepada Pengecualian 2 kepada s 300 Kanun. Berhubung piawai bukti, perayu-perayu perlu meyakinkan mahkamah. Pembelaan telah gagal membuktikan pembelaan peribadi di bawah Pengecualian 2 kepada s 300 (lihat perenggan 232 & 236).]

Notes

For a case on defence, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) para 1157.
For a case on whether witness was an accomplice, see 5(1) *Mallal's Digest* (4th Ed, 2007 Reissue) para 16.
For cases on corroboration generally, see 7(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 948–1096.
For cases on grave and sudden provocation, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1162–1163.
For cases on relevancy generally, see 7(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2358–2370.
For cases on s 302, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1520–1579.
For cases on ss 34, 302, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1288–1302.
For cases on whether witness was accomplice, see 7(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 80–85.

Cases referred to

(1) Namasiyiam (2) Rajindran (3) Goh Chin Peng, and (4) Ng Ah Kiat v PP [1987] 2 MLJ 336; [1987] 1 CLJ 540, SC (refd)
Abdullah bin Jacomah v PP [2002] 6 MLJ 324, HC (refd)
Attan bin Abdul Gani v PP [1970] 2 MLJ 143 (refd)
Balachandran v PP [2005] 2 MLJ 301, FC (refd)
Brabakaran v PP [1966] 1 MLJ 64, FC (refd)
Chandrasekaran & Ors v PP [1971] 1 MLJ 153 (refd)
Davies v Director of Public Prosecutions [1954] 1 All ER 507, HL (refd)
Ganesh Singh v Ram Pooja (1869) 3 BLR 44 (refd)
Goh Ah Yew v PP [1949] MLJ 150 (refd)
Gorachand Gopi (1860) BLR 443 (refd)
Harcharan Singh & Anor v PP [2005] 1 MLJ 593; [2005] 1 CLJ 11, CA (folld)
Haryadi bin Dadeh v PP [2000] 4 MLJ 71, FC (refd)
Jegathesan v PP [1980] 1 MLJ 165, FC (refd)
Juraimi bin Husin v PP [1998] 1 MLJ 537; [1998] 1 AMR 758, CA (refd)

Kenneth Fook Mun Lee v PP [2007] 2 MLJ 130; [2006] 4 CLJ 359, FC (refd)
King, The v Baskerville [1916] 2 KB 658 (refd)
Kuan Ted Fatt v PP [1985] 1 MLJ 211; [1985] CLJ (Rep) 174, FC (refd)
Lee Kwai Heong & Anor v PP [2006] 2 MLJ 528, CA (refd)
Lee Thian Beng v PP [1972] 1 MLJ 248, FC (refd)
Mimi Wong & Anor v PP [1972] 2 MLJ 75 (refd)
Mohamad Radhi bin Yaakob v PP [1991] 3 MLJ 169, SC (refd)
Mohamad Yassin v PP [1994] 3 SLR 491, CA (refd)
Mohamed Yasin bin Hussin v PP [1976] 1 MLJ 156, PC (refd)
Mohd Nor Riza Mat Tahar v PP [2008] MLJU 880; [2009] 3 CLJ 350, CA (refd)
Ng Yau Thai v PP [1987] 2 MLJ 214, SC (refd)
Nor Hasnizam bin Ab Latif v PP [2002] 1 MLJ 154, CA (refd)
PP v Abdul Azizsou & Ors [1978] 2 MLJ 165 (refd)
PP v Ho Jin Lock and another trial [1999] 3 MLJ 625, HC (refd)
PP v Krishna Rao a/l Gurumurthi & Ors [2000] 1 MLJ 274, HC (refd)
PP v Lim Kuan Hock [1967] 2 MLJ 114 (refd)
PP v Visuvanathan [1978] 1 MLJ 159 (refd)
PP v Mohd Jamil bin Yahya & Anor [1993] 3 MLJ 702, HC (refd)
PP v Mohd Nor Riza bin Mat Tahar [2009] 4 CLJ 691, FC (refd)
PP v Muhamad Nasir bin Shaharuddin & Anor [1994] 2 MLJ 576, HC (refd)
PP v Neoh Wan Kee [1985] 1 MLJ 368 (refd)
PP v Reza Mohd Shah bin Ahmad Shah [2002] 4 MLJ 13, HC (refd)
PP v Saimin & Ors [1971] 2 MLJ 16 (refd)
PP v Sainal Abidin Mading [1998] 3 CLJ 41, HC (refd)
PP v Tan Joo Cheng & Ors [1991] 1 MLJ 196, HC (refd)
Regina v Gallagher [1974] 1 WLR 1204, CA (refd)
Sainal Abidin bin Mading v PP [1999] 4 MLJ 497; [1999] 4 CLJ 215, CA (refd)
Shaiful Edham bin Adam & Anor v PP [1999] 2 SLR 57, CA (refd)
Shanmugam v PP [1963] MLJ 125 (refd)
Soo Leot, Re [1956] MLJ 54 (refd)
Sunny Ang v PP [1966] 2 MLJ 195, FC (refd)
Tan Buck Tee v PP [1961] MLJ 176, CA (refd)
Tan Cheow Bock v PP [1991] 3 MLJ 404 (refd)
Tay Choo Wah v PP [1976] 2 MLJ 95 (refd)
Tham Kai Yau & Ors v PP [1977] 1 MLJ 174, FC (refd)
Thavanathan a/l Balasubramaniam v PP [1997] 2 MLJ 401; [1997] 3 CLJ 150, SC (refd)
Wong Teck Choy v PP [2005] 4 MLJ 693; [2005] 3 CLJ 431, CA (refd)
Yap Ee Kong & Anor v PP [1981] 1 MLJ 144, FC (refd)
Zailani bin Ahmad v PP [2004] SGCA 56 [2005] 1 SLR 356, CA (refd)

Legislation referred to

Criminal Justice and Public Order Act 1994 [UK] s 32
Criminal Procedure Code ss 180, 181, 182A
Evidence Act 1950 ss 3, 8, 114, 114(b), 133
Evidence Act of Singapore [SG] ss 116, 135
Penal Code ss 34, 96, 97, 300, 300(a), (c), (d), Exception 2, 302

Appeal from: Criminal Trial No 45–19 of 2003 (High Court, Muar)

Abraham Mathew (Ramesh Vasan with him) (NP Ramachandran & Associates) for the appellants.
Suzana Atan (Senior Federal Counsel, Attorney General's Chambers) for the prosecution.

Zainun Ali JCA:

[1] In the instant appeal, several legal issues came up for consideration such as the effect of an uncorroborated evidence of accomplice; the issue of whether there exists a common intention; the legal consequence of non-recovery of the murder weapon; and whether the appellants succeeded in establishing the defence of self defence of a grave and sudden provocation.

THE BRIEF FACTS

The prosecution's case

[2] The charge against both the appellants read as follows:

> That both of you in furtherance of common intention had on 18 December 2002, between 2.00 a.m. until 4.30 a.m. beside Jalan Pisang Raja Udang, Desa Harmoni in the district of Kluang in the state of Johor Darul Takzim had committed murder by causing the death of one Malay man, namely Azley bin Abu Bakar, NRIC No: A3147272 and thereby had committed an offence punishable under s. 302 of the Penal Code read with section 34 of the same Code.

[3] Basically it was in evidence that one Ibrahim bin Mohd Zain ('PW9') testified that both the appellants sought his help in retrieving monies owed to them by the deceased. The deceased had apparently kept for himself monies which were supposed to be shared between them after the deceased had disposed of a stolen television set.

[4] PW9 testified that the first appellant came almost everyday to his drink stall at Kluang, Station Bus Kluang. For the past one and half months, the first appellant brought along the second appellant on these visits. Thus PW9 said

that he knew the second appellant only about one and half months prior to the incident. The said incident will be elaborated upon shortly.

[5] According to PW9 the deceased was not known to him.

[6] On 18 December 2002 at about 2am both the appellants came to his stall to seek PW9's assistance to recover money from the deceased for their share in the sale of a stolen television in which the total amount was with the deceased.

[7] PW9 was told by the appellants that he will be rewarded in cash for his services.

[8] The second appellant then informed PW9 that he wanted to telephone the deceased to go over to PW9's residential area that is Taman Harmoni, Kluang. In actual fact, this is only a ploy for the deceased to meet them at a place earlier suggested by the first appellant, on the pretext of asking the deceased to help retrieve them some stolen television sets which they said they had hidden in the area.

[9] About ten minutes later, the deceased came in a car bearing registration car No JGL 8059. One Norazafazila bt Mohd Din testified that the said car was registered under her name and was used by the deceased who was her husband.

[10] Upon the arrival of the deceased at PW9's stall, all four of them proceeded to Taman Harmoni. The deceased drove the car with the first appellant sitting beside him, while the second appellant sat behind the driver (ie the deceased), whilst PW9 sat behind the second appellant.

[11] They arrived at the spot as seen in photograph P26(11) and (12) as stated by PW9.

[12] The first and second appellants and PW9 then went out of the car pretending to look for the stolen computers whilst the deceased remained in the car. The second appellant and PW9 waited on top of the cliff whilst the first appellant walked down the cliff, on the pretext of looking for the stolen computers. The second appellant then asked PW9 to ask the deceased to come out of the car on the pretext of asking him to help carry the heavy computer. PW9 did as he was told.

[13] The deceased then alighted from the car and rested behind the car bonnet. PW9 proceeded to inform him that in actual fact the tale they spinned about the stolen computers was fabricated; that the real reason he was brought to the scene was to ask him to give the appellants share of selling the stolen

A television set. At that time, PW9 testified that he was standing beside the deceased who was on his right side whilst his hand held the deceased's shoulder. The deceased did not say anything. The first appellant was standing about 5–8 feet in front of PW9. PW9 said he did not see where the second appellant was. When he (PW9) turned, he testified that he saw the second appellant swinging
B a wooden baseball bat on the deceased's head. He tried to prevent the blow but the bat hit both his hand and the deceased's head on the right side. The assault came from the right side of the deceased.

C **[14]** Due to extreme pain which PW9 felt on his hand, he immediately squatted and looked down to control his pain. When he looked again up he saw the first appellant assaulting the deceased with a *parang* whilst the second appellant hit the deceased with a wooden baseball bat which was about 2 feet long. He testified that he saw the second appellant taking the baseball bat from
D under the drivers' seat of the deceased's car.

[15] He saw them assaulting the deceased for about five to six times. He saw the deceased bending down, cowering, his hands covering his head. He saw the deceased being assaulted on his head and his body by the first appellant, using
E a *parang* and the second appellant, using a wooden baseball bat. However, he did not know where the *parang* came from.

[16] PW9 then approached the appellants and stopped them from further
F assaulting the deceased. They stopped hitting the deceased whose head was by then covered in blood. When PW9 saw the deceased falling and practically immobile, he was frightened and asked both the appellants to get away from the scene.

G **[17]** The first appellant then send PW9 back to his stall at about 3–4am with the deceased's car. The appellants then gave him a handphone that they found in the car as a reward for helping them and left the stall at about 5–6am. They both came again later and informed PW9 that the deceased had died.

H **[18]** A week later PW9 met both the appellants at his stall. They had walked to the stall at about 5am in the morning. The first appellant then asked PW9 to drive the deceased's car since PW9 had a licence. He was uncertain whether they had a licence. They promised to pay PW9 without stating the amount, as a reward to take the computers. After about half an hour, both of them came
I back with the computers. The second appellant then instructed PW9 to drive to Rengit, Batu Pahat to sell the computers. They arrived at about 6am in the morning. They went around the shops which would normally buy computers. The shopkeeper was not around and they had to wait. It was at this time that policemen from the Rengit police station came by and upon seeing the

computers in the car, arrested all three of them.

The defence's case

[19] At the end of the prosecution's case, the learned judicial commissioner held that after giving maximum evaluation in the assessment of evidence, the prosecution had proven a prima facie case and both the appellants were called to make their defence.

The first appellant's testimony

[20] The first appellant gave his evidence on oath. On 18 December 2002, he went to PW9's place to buy drugs (heroin and cannabis) as he was a drug addict.

[21] According to the first appellant he was acquainted with the deceased for about six months prior to the murder. He also knew PW9 about six to eight months prior to the night in question, since he frequented PW9's stall and that the second appellant was always with him. PW9 commented that they looked troubled. PW9 asked them the reason and both of them told PW9 that the deceased had cheated them. PW9 suggested they call the deceased to settle their problem. The second appellant then called the deceased on the telephone but the first appellant said he could not hear what was spoken. The first appellant then asked PW9 to demand the deceased for monies owed to them and he and the second appellant promised PW9 that they will pay him for his service. Upon the deceased's arrival, they all went to the scene of the crime. The first appellant said he was familiar with the area as they always kept their stolen goods there, which were almost always covered with canvas. When they alighted from the car, he noticed the deceased taking out a wooden baseball bat and a *parang* and that the deceased put the items on the drivers' seat. All of them went slightly away from the car whilst the deceased leaned against the car bonnet. Then he heard PW9 asking the deceased about the money. PW9 put his hand on the deceased's shoulders to discuss. Suddenly the deceased became angry.

[22] He swung the wooden baseball bat and hit PW9's hand. At that time the deceased and the second appellant were on his left.

[23] According to the first appellant, PW9 then pushed the deceased who then fell beside the road side. The first appellant testified that PW9 and the deceased seemed to be struggling for about two to five minutes. The deceased fell and the second appellant grabbed the wooden baseball bat. The first appellant said he looked on but did not do anything.

[24] The first appellant continued by saying that the deceased then stood up and ran straight to the drivers' seat and took out the *parang*. The first appellant was still standing behind the car where the deceased fell down. The first appellant testified that the second appellant told him that the deceased had taken the *parang* and attacked the second appellant. At that moment PW9 was behind the car squatting in pain. The first appellant said that the second appellant saw him defending himself by using the wooden baseball bat and how he had retaliated. He said he swung three times but only hit the deceased once on the head. The first appellant testified that the deceased continued attacking the second appellant with the *parang* but that the second appellant managed to avoid the blows. He was not injured. The first appellant testified that the second appellant then punched the deceased on his right eye and the deceased fell beside the road side where there was gravel as in photograph P26(5). The deceased was immobile.

[25] The first appellant testified that he spoke to PW9 and thereafter he went to where the deceased fell and took out a wallet, handphone and car key from the deceased's pocket.

[26] The first appellant said that PW9 then asked them to run away using the deceased's car. PW9 drove the deceased's car and they arrived at PW9's stall at about 3–4am. The first appellant said that PW9 later asked them to see what had happened to the deceased. The first appellant said that when they went back to the place he took the *parang* which he had brought along and twisted the deceased's body with the *parang* slightly to check whether he had fainted or had died.

[27] They then returned to PW9's stall and informed him that the deceased is truly dead. The first appellant said that PW9 later asked them to throw the wooden baseball bat and the *parang* into a river. The first appellant then threw out the carpet in the car as there were a lot of soil on it. He kept the car key but walked home which was about ten minutes away.

[28] According to the first appellant, subsequently, one, Hj Ahmad bin Samsuri ('PW4') who was the village chief, said that he was informed by a group of women joggers who came to his house to inform him, that they had seen someone who had fallen down from a high slope. PW4 then went to the scene and saw a person who was covered in blood leaning on a high slope. PW4 confirmed the position that he saw the body as in photograph P26(5).

[29] According to the first appellant as no one responded to PW4's phone calls to the police station, PW4 went there personally and met PW3, woman corporal Maria Muhammad who was at that time the Head of the Enquiry

Room Officer, Kluang police station to inform her of the dead body. PW4 confirmed the position of the deceased as in photograph P26(5).

[30] PW14, Dr Shahidan bin Mohd Noor was the pathologist who conducted the post mortem on the deceased on 19 December 2002 at about 12.45pm. He said the body was identified by the investigating officer, C/Insp Md Shah bin Kamarudin, PW13. The identity of the deceased was informed to him a week after the post mortem as PW13 informed him of the identity of the deceased only on 26 December 2002 at about 3.30pm at Hospital Sultan Aminah Johor Bahru.

[31] The body was later identified by the victim's father, PW7, one Abu Bakar bin Abd Rahman at the mortuary and also through a photograph ie P27(1).

The second appellant

[32] The second appellant gave his defence on oath.

[33] According to him, he and the first appellant was in a robbery and house breaking group. He always met the deceased and the first appellant. He said PW9 was his supplier for heroin and cannabis drugs. He always met PW9 with the first appellant at PW9's stall selling water at the Kluang bus station.

[34] On 17 December 2002 at midnight, he said he went to get his supply and smoke behind the stall with the first appellant and PW9. Then they sat at PW9's stall when PW9 noticed their faces seemed troubled. PW9 asked them why and both of them told him that the deceased had cheated them. The second appellant testified that he never ask his (PW9's) help. The second appellant testified that he was asked by PW9 to call the deceased and he obliged by using the public phone near the bus stop. Within ten minutes, the deceased arrived in a car. They (the first and second appellant and PW9) then entered the car. When the deceased asked their destination, PW9 said to the 'normal place'. The deceased knew where that 'normal place' is. The first and second appellant and deceased is also familiar with the place as that is the place where they kept their stolen goods.

[35] When they arrived, all of them went to the back of the car with the deceased bringing along with him the wooden baseball bat which he leaned on the back of the car.

[36] PW9 then held the deceased's shoulders and asked him about the money which the deceased had taken and told the deceased that they were there

to discuss and not to quarrel. The second appellant said that suddenly the deceased became angry. The second appellant took the wooden baseball bat and hit PW9. PW9 pushed him. The second appellant then came and grappled with the deceased to seize the wooden baseball bat. He managed to seize the wooden baseball bat before the decease a fell to the ground.

[37] The deceased then stood up and went straight to the driver's seat. He took a *parang* and assaulted the second appellant. He swung the *parang* at him. The second appellant avoided the blow. In order to defend himself, the second appellant took the wooden baseball bat and hit the deceased once on the head. The deceased tried to assault the second appellant again. He defended himself and hit the deceased once more on the head with the wooden baseball bat. Then he punched the left eye of the deceased. The deceased fell. At that time, PW9 was outside the driver's door. The first appellant then came to take away the *parang* from the deceased.

[38] PW9 then went to the deceased and took his handphone, his wallet and just prior to that, he had taken the deceased's car key from the deceased's trouser pocket.

[39] After that, they left the place with the car, driven by PW9 to PW9's stall. PW9 then asked the first and second appellant to check whether the deceased is dead or alive. The first appellant drove the deceased's car. At the scene, the first appellant checked the deceased's body by twisting the *parang* on the deceased's body to check whether he is dead or had merely fainted (the *parang* was in the deceased's car brought by the second appellant).

[40] They then went back to PW9's stall and informed him the first appellant had tried to move the deceased but he did not move, confirming that the deceased had truly died.

[41] PW9 then asked the first and second appellant to throw the wooden baseball bat and the *parang* into a river. The appellants did as instructed. They then left the deceased's car at PW9's place and went home. They threw the carpet near PW9's stall. The first appellant kept the deceased's car key.

THE LAW

Standard of proof at the end of the prosecution's case

[42] Section 180 of the Criminal Procedure Code states:

Section 180 Procedure after conclusion of case for prosecution

(1) When the case for the prosecution is concluded, the Court shall consider whether the prosecution has made out a prima facie case against the accused.

(2) If the Court finds that the prosecution has not made out a prima facie case against the accused, the Court shall record an order of acquittal.

(3) If the Court finds that a prima facie case has been made out against the accused on the offence charged the Court shall call upon the accused to enter on his defence.

[Sub. Act A979: s.4]

[43] The words 'prima facie' is defined by the courts in the following cases.

[44] In the Federal Court case of *Balachandran v Public Prosecutor* [2005] 2 MLJ 301, it was held:

> As the accused can be convicted on the prima facie evidence it must have reached a standard which is capable of supporting a conviction beyond reasonable doubt. However it must be observed that it cannot, at that stage, be properly described as a case that has been proved beyond reasonable doubt. Proof beyond reasonable doubt involves two aspects. While one is the legal burden on the prosecution to prove case beyond reasonable doubt the other is the evidential burden on the accused to raise a reasonable doubt. Both these burdens can only be fully discharged at the end of the whole case when the defence has closed its case. Therefore a case can be said to have been proved beyond reasonable doubt only at the conclusion of the trial upon a consideration of all the evidence adduced as provided by s 182A(1) of the Criminal Procedure Code. That would normally be the position where the accused has given evidence. However, where the accused remains silent there will be no necessity to re-evaluate the evidence in order to determine whether there is a reasonable doubt in the absence of any further evidence for such a consideration. The prima facie evidence which was capable of supporting a conviction beyond reasonable doubt will constitute proof beyond reasonable doubt.

[45] On the test of prima facie, the Federal Court held thus:

> The test at the close of the case for the prosecution would therefore be: is the evidence sufficient to convict the accused if he elects to remain silent? If the answer is in the affirmative then a prima facie case has been made out. This must, as of necessity, require a consideration of the existence of any reasonable doubt in the case for the prosecution. It there is any such doubt there can be no prima facie case.

Ingredients of murder

[46] Section 300 of the Penal Code read as follows:

> Except in the cases hereinafter excepted, culpable homicide is murder —
>
> (a) if the act by which the death is caused is done with the intention of causing death;

(b) if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;

(c) if it is done with the intention of causing the bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or

(d) if the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death, or such injury as aforesaid.

[47] To sustain a conviction punishable under s 302 of the Penal Code, the following ingredients must be established against the accused:

(a) that Azley bin Abu Bakar is dead;

(b) that Azley bin Abu Bakar died as a result of injuries sustained by him;

(c) that the injuries of Azley bin Abu Bakar were caused by or the results of the acts of the appellants; and

(d) that in inflicting those injuries upon Azley bin Abu Bakar, the appellants either:

(i) caused them with the intention of causing the death on Azley bin Abu Bakar; or

(ii) caused them with the intention of causing such bodily injuries on Azley bin Abu Bakar as the appellants knew to be likely to cause death; or

(iii) caused them with the intention of causing bodily injuries on Azley bin Abu Bakar and such bodily injuries intended to be inflicted were sufficient in the ordinary course of nature to cause death; or

(iv) committed the acts that are imminently dangerous that they must in all probability cause death or such bodily injuries as are likely to cause death.

Ingredients of the offence

The first ingredient: Azley bin Abu Bakar is dead

[48] This issue was never disputed by the appellants.

The second ingredient: Azley bin Abu Bakar died as a result of injuries sustained by him

[49] The ingredient is solicited from the evidence of Dr Shahidan bin Mohd

Noor ('PW14'). On 19 December 2002 at 12.45pm as he explained that was the correct time and not 11.30pm. PW14 recorded his findings and prepared a post mortem report marked as P40. He set out his expertise and which was not disputed.

[50] According to PW14, he found the following injuries on the deceased:

(a) External examination

The body was that of a yet to be identified male person 167cm tall of small build with a slim and thin disposition. He had short black hair and dyed brown on front and sides. He spotted no moustache though some hairs below middle of lower lip of the mouth and central goatee with the sides shaved. He was clad in a 'GA Blue' blue jeans trousers size 33 with attached dark brown leather belt with Levi's buckle, a dark short sleeved shirt with certain at end-of-sleeve and a blue no label underwear. Most of the body surfaces were smeared with mud or red earth particles.

The penis was circumcised.

He bore the following marks of trauma namely:

(i) laceration 3 x 1cm on upper right forehead with bruise around it (15cm above and outer to eyebrow);

(ii) abrasion 5 x 3.5cm on right cheek;

(iii) laceration 1.5 x 0.5cm at outer end of left eyebrow with left periorbital bruising;

(iv) laceration of upper one-third of the left pinna with horizontal tear 2.5cm of cartilage;

(v) laceration 5 x 0.5cm vertical and 1.2cm deep on left back of the head 6cm back of lower end of the left ear;

(vi) abrasion 2.5cm on upper left neck 3cm below the ear;

(vii) laceration 5 x 0.5cm vertical and 1.2cm deep on left back of the head 6 cm behind ear;

(viii) incised wound 5 x 0.5cm and 1.5cm deep with the bone underneath nicked on the left back of head some 12cm behind the ear;

(ix) laceration 3 x 0.5cm and 1cm deep on the left back of head its inner end 12cm above nape;

(x) laceration 1x 0.5cm on right side of the head 6cm above the ear;

(xi) abrasion 1cm on the bridge of nose;

(xii) bruise 2 x 1cm on inner left shoulder;

(xiii) oval bruises 6 x 2.5cm parallel separated by 4 x 1.5cm skin on inner right chest nipple level;

(xiv) superficial incised wound 7.5cm on left subcostal area;

(xv) laceration 2.5 x 1cm on right corner of the mouth and with laceration of upper gum between incisor and canine;

(xvi) tramline bruises 6 x 0.5cm separated by 2cm on outer back upper one-third of right arm;

(xvii) superficial incised wound 8cm horizontal on outer back lower right arm 6cm above elbow;

(xviii) abrasion 6 x 0.5cm horizontal on outer upper one-third right thigh;

(xix) abrasion 5 x 2.5cm with ulcer 1.5 x 0.5cm on superior right chest between neck and shoulder;

(xx) tramline bruises 7 x 1cm and separated 1.5cm on right middle back;

(xxi) incised wound 2.5 x 1cm and 1.5cm horizontal on lower left back 7.5cm above the sacrum;

(xxii) five small abrasions the largest 1cm on the lower back;

(xxiii) abrasion 2.5 x 1cm on outer lower right arm near the elbow; and

(xxiv) five abrasions the largest 5cm on upper left forearm.

Rigor mortis was generalised.

(b) Internal examination

(i) Head

The scalp when reflected in the usual way showed soft tissue bleeding in both temporalis muscles more so on the left side. The skull showed a crack fracture 5cm on the left temporal bone with hinge fracture of the base across middle fossae and fractured right orbital roof. The brain (1,220g) showed focal subarachnoid haemorrhages on anterior half of the left cerebrum and subarachnoid haemorrhages with contusions of posterior two-thirds of the right cerebrum. There were also contusions on the undersurfaces of both frontal lobes and right temporal lobe.

(ii) Mouth, throat and neck structures

Soft tissue bleedings present about the angles of lower jaw on both sides and around right submandibular gland.

No abnormality or injury seen in the other structures of these regions.

(iii) Chest

The ribcage was intact however its chest wall showed foci of soft tissue bleeding at the ninth intercostals space about the back on the right side and at the 11th intercostals space also on the back on the left side. The pleural cavity on each side however was clear and dry. The oesophagus showed regurgitation of some food material. The trachea and its air passages showed some blood aspirated into them. Both lungs (right 350g, left 250g) were congested. The pericardial sac was intact and free from effusion. The heart (250g) was of average size and configuration and showed foci of subendocardial bleeding in the left ventricle otherwise unremarkable in all other respects.

(iv) Abdomen

The abdominal wall was intact and its cavity clean. The stomach contained substantial partially digested foodstuffs admixed with blood. The liver (1,000g), spleen, kidneys, adrenal glands, pancreas and the intestines were all intact and unremarkable.

(v) Skeleton

No other bony injury save those present on the skull as described.

(c) Other investigations

Samples of blood and head hair each were submitted for analysis.
Items of clothing were also submitted.

(d) Conclusions

We were informed that this male was found at a certain clearing near the road edge of Jalan Pisang Raja Udang, Desa Harmoni in Kluang morning of 18 December 2002.
The post mortem examination showed multiple surface marks of trauma on the body namely abrasions, bruises and lacerations along with incised wounds. He sustained head injury which was attributed to his sudden demise. The cause of death was formulated as due to such.

(e) Cause of death

Head injury.

The third ingredient: the injuries of Azley bin Abu Bakar were caused by or the results of the acts of the appellants

[51] The prosecution relied heavily on the evidence of PW9, Ibrahim bin Mohd Zain who witnessed the assault that caused the injuries. He testified that he saw the first appellant assaulting the deceased with the *parang* whilst the second appellant assaulted the deceased with the wooden baseball bat.

[52] According to PW14, the wooden baseball bat which was about 2 feet long, was the blunt force that caused the skull to crack.

The fourth ingredient: that in inflicting those injuries upon Fazley bin Abu Bakar, the appellants either caused them with intention of causing death on Fazley bin Abu Bakar; or caused them with the intention of causing such bodily injuries on Fazley bin Abu Bakar and the appellants knew to be likely to cause death; or committed the acts that were imminently dangerous that they must in all probability cause death or such bodily injuries are like to cause death

[53] The illustrations (a) and (c) of s 300 of the Penal Code states:

(a) *A* shoots *Z* with the intention of killing him. *Z* dies in consequence. A commits murder.

(b) …

(c) *A* intentionally gives *Z* a sword-cut or club-wound sufficient to cause the death of a man in the ordinary course of nature. *Z* dies in consequence. Here *A* is guilty of murder, although he may not have intended to cause *Z*'s death.

(d) …

[54] Instances where cases under cl (a) are not death as spelt out in *Ratanlal and Dhirajlal's The Indian Penal Code*, (28th Ed) at pp 372–373 are as follows:

… Infliction of stab injury on chest with a lethal weapon was held to be an evidence of the intention to cause death …

Where the accused assaulted the deceased even when he fell down, his intention to kill was clear and his conviction for murder was held to be proper …

[55] It continues, thus (at p 374):

… Where intention to cause death of the victim could be inferred from the fact that the accused delivered a blow on the victim's head with sword with great force, his conviction under s. 302 was held to be proper. Where the accused assaulted a man on the head and other vital parts of his body with deadly weapons, causing his death, it was held that the assault was with an intention to cause death ….

The accused waiting for the deceased on the road ahead, thereafter accosted and inflicted a single wound in his chest which turned out to be fatal. From the circumstances, the intention to cause death was inferred, the offence attracted 300 ….

[56] Instances where cases under cl (c) as commented in *Ratanlal and Dhirajlal's The Indian Penal Code*, (28th Ed) at pp 378–379 thus:

… Where a man intentionally kills another, or intentionally inflicts bodily injury sufficient in the ordinary course of nature to cause death, his act is murder. The accused dealt severe blows with a fairly heavy lathi on the body of the deceased

causing fracture of two ribs, injury to the pleura, and laceration and puncture of the right lung. It was held that the accused was guilty of murder.

Even if none of the injuries by itself was sufficient in the ordinary course of nature to cause death, cumulatively such injuries may be sufficient in the ordinary course of nature to cause death …

[57] Further said, thus (at p 381):

… Two men met each other in a drunken state and commenced a quarter during which they abused each other. This lasted for about half an hour, when one of them ran to his own house and came back with a heavy pestle with which he struck the other a violent blow on the left temple causing instant death. It was held that the offence fell within clauses 2 and 3. Where the accused inflicted a stab with a sharp-pointed weapon which entered the upper part of the deceased's stomach, causing rupture of it, it was held that this act came under this clause …

[58] Cases under cl (d) commented in *Ratanlal and Dhirajlal's The Indian Penal Code*, (28th Ed) at p 382, thus:

… Thus, a man who strikes at the back of another a violent blow a formidable weapon, or who strikes another in the throat with a knife must be taken to know that he is doing an act imminently dangerous to the life of the person at whom he strikes and that a probable result of his act will be to cause that person's death.

[59] It continues, thus (at p 383):

Where the accused, four in number, all armed with heavy sticks, felled the deceased, who was defenceless and armless, gave him a prolonged beating and inflicted several blows, completely smashing the skull, it was held that they were all guilty of murder under this clause …

[60] In *Ratanlal and Dhirajlal's Law of Crimes*, (26th Ed), the learned author gave certain examples (at p 1390) as thus:

… where a man struck the deceased on the head with a formidable lathi and fractured his skull … it was held that murder was committed.

[61] At p 1392, thus:

… Repeated blows or even a single blow forcibly delivered with a heavy weapon would make the offence a murder, but where a sudden blow is struck with a stick that is not heavy, the offence would be culpable homicide not amounting to murder …

Where the accused gave a blow with chhura on the chest of the deceased, when she tried to run away, he caught hold of her hair, threw her on the ground and again assaulted with the chhura on the abdomen and the back of the deceased, the injuries

inflicted being grievous in nature, dangerous to life which resulted in causing death of the deceased, the court held that even an illiterate and ignorant can be presumed to know that an intense assault with such weapon on such vital parts of the body would cause death, therefore, the accused was liable to be convicted under section 302 and not under section 324.

[62] The learned author in *Ratanlal and Dhirajlal's Law of Crimes*, (26th Ed) at p 1401 further commented:

> The emphasis in this clause is on the sufficiency of the injury in the ordinary course of nature to cause death. The sufficiency is the high probability of death, in the ordinary way of nature. When this sufficiency exists and death follows and the causing of such injury is intended, the offence is murder. Sometimes the nature of the weapon used, sometimes the part of the body on which the injury is caused, and sometimes both are relevant … The nature of the material object used and the force used are useful guides in arriving at a decision as to whether the intention and knowledge required by this section can be attributed to the accused …

[63] And at p 1580, the same learned author commented:

> The number of injuries is irrelevant. It is not always the determining factor in ascertaining the intention. It is the nature of injury, the part of the body where it is caused, the weapon used in causing such injury which are the indicators of the fact whether the accused caused the death of the deceased with an intention of causing death or not.

[64] Further, the same author in *Ratanlal and Dhirajlal's Law of Crimes*, (26th Ed) commented:

At p 1407:

> Where the Appellant was shown to have give a fatal blow by means of a lathi on the head of the deceased, then the mere fact that the Appellant also had a gun hanging from his shoulders but did not use it, would not go to show that he had no intention to kill the deceased, particularly when the injury inflicted by lathi was on the head of the deceased which was a vital part and the medical evidence showed that injury proved fatal.

And at p 1408, thus:

> The accused killed a person by striking him one blow on the head with a long heavy bamboo. The nature of the injury indicated that very great force was used. It was held that although the weapon used was not one that would of necessity cause fatal injury, the force used was so great as to show that the accused intended to cause injury sufficient in the ordinary course of nature to cause death, and that he was guilty of murder. There can be no doubt that a person delivering a violent blow with a lethal weapon like a dang (club) on a vulnerable part of the body such as the head

must be deemed to have intended to cause such bodily injury as he knew was likely to cause the death of the person to whom the injury was caused.

At p 1416:

Where the accused assaulted the deceased and beat him to death with lathis, it was held that they were guilty of murder as they must have known that their act was so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death. Where the injury inflicted by the accused person was of such a nature as any sober man must surely have known that the injury was likely to cause death and where the injury was sufficient in the ordinary course of nature to cause death, it was held that the offence was one of murder.

[65] In Malaysia, in *Tham Kai Yau & Ors v Public Prosecutor* [1977] 1 MLJ 174, as to the illustration (a) to s 300, the court said, that:

there is an intention to kill, as in (a) and (l), the offence is always murder …

[66] In respect of illustration (c) to s 300, the court continued on, thus:

… it is murder, if such injury is sufficient in the ordinary course of nature to cause death. Illustration (c) given in s 300 of the Penal Code is an example …

[67] It is settled law that an intention to kill is inferred by the court by looking at the nature and number of injuries caused to the deceased person and the object used in inflicting these injuries.

[68] The court in *Tan Buck Tee v Public Prosecutor* [1961] MLJ 176 had viewed the nature of injuries sustained by a victim as an indicator of intention to kill, thus:

There was the body with five appalling wounds on it, wounds penetrating to the heart and liver, which must have been caused by violent blows with a heavy sharp instrument like an axe. In the absence of anything else, whoever inflicted those blows must have intended to kill the person on whom they were inflicted.

[69] Intention is a matter of inference as enunciated in *Tham Kai Yau & Ors v Public Prosecutor* [1977] 1 MLJ 174, thus:

It cannot be disputed that intention is a matter of inference. The deliberate use by some men of dangerous weapons at another leads to the irresistible inference that their intention is to cause death. This inference should therefore make it a simple matter to come to a decision as to intention, in any case, such as the present, where the weapons used by the appellants were deadly weapons and where the person killed was struck more than one blow.

[70] In *Public Prosecutor v Sainal Abidin Mading* [1998] 3 CLJ 41, to ascertain the state of mind of the accused, the court had this to say:

> … Meanwhile, as regards intention it is something which is incapable of direct proof. It is also not something that can be seen. It is the state of the mind. Hence, to ascertain it the surrounding circumstances have to be considered including the nature of wounds inflicted, the number of wounds, the part of the victim's body which sustained the injuries and the nature of the weapon's used.

[71] Applying the principles aforesaid to cl (c), the court in that case said, that:

> In the instant case, there is as hardly any dispute on the nature of the wounds sustained by the deceased, the number of wounds and the weapons used. From the evidence of PW3, the left ventricle of the heart and the right suffered the fatal blows which would not have allowed life to continue for more than ten minutes. The deep penetration of the three fatal wounds were the result of substantial force used according to PW3. It was the view of PW3 that such wounds were sufficient in the ordinary course of nature to cause death.

[72] The court then concluded that:

> Accordingly, from the evidence adduced and the surrounding circumstances shown, I am satisfied that the prosecution has established beyond reasonable doubt that in inflicting the injuries sustained by the deceased the accused had, in particular, the intention of causing such bodily injuries and such injuries intended were sufficient in the ordinary course of nature to cause death …

[73] In *Nor Hasnizam bin Ab Latif v Public Prosecutor* [2002] 1 MLJ 154, the Court of Appeal said, that:

> On the question of intention to kill, it is a matter of inference from the nature of the wounds …

[74] Having that principle in mind, the court continued on to say, that:

> The bone of contention of the defence was that the injury caused to Yong was accidental. From the nature of injuries inflicted on Yong referred to earlier and based on the authorities aforesaid, it could be inferred that the appellant must have intended to kill Yong within the meaning of s 300 of the Penal Code.

[75] In that case, on the issue whether the death was accidentally, the court concluded, that:

On the issue whether death was accidentally caused the learned trial judge had considered the evidence of SP7, SP4 and the appellant and arrived at the following finding:

Persoalan pertama yang perlu diputuskan ialah sama ada cerita tertuduh pertama bahawa kecederaan yang dikenakan ke atas si mati adalah satu kemalangan dibuat tanpa niat dan secara tidak sengaja. Saya tidak dapat menerima keterangan tertuduh pertama tersebut. Jika versi tertuduh pertama itu benar, saya percaya kecederaan yang dialami oleh si mati tidak akan menjadi sebegitu serius sehingga menembusi karung jantung si mati. Melihat luka tikaman yang dialami si mati, saya berpendapat tikaman dibuat dengan begitu kuat menyebabkan kecederaan tersebut … (Emphasis added.)

[76] In *Mohamed Yasin bin Hussin v Public Prosecutor* [1976] 1 MLJ 156, the court said that:

To establish that an offence had been committed under s 300(c) or under s 299, it would not have been necessary for the trial judges in the instant case to enter into an enquiry whether the appellant intended to cause the precise injuries which in fact resulted or had sufficient knowledge of anatomy to know that the internal injury which might result from his act would take the form of fracture of ribs, followed by cardiac arrest. As was said by the Supreme Court of India when dealing with the identical provisions of the Indian Code in *Virsa Singh v The State of Punjab* AIR 1958 SC 465 at p 467:

… that is not the kind of enquiry. It is broad-based and simple and based on common sense.

[77] In *Public Prosecutor v Tan Joo Cheng & Ors* [1991] 1 MLJ 196 the court said, that:

We now turn to the final question whether on the facts found by us, Joo Cheng and Kang Hai are each guilty of the offence charged. The case of the prosecution is that Joo Cheng intended to stab Lee at the base of his neck and the injury inflicted was sufficient in the ordinary cause of nature to cause death and death was so caused; the prosecution is relying on the provision of s 300(c) of the Penal Code. Counsel for Joo Cheng submitted that the stab wound was inflicted in course of a struggle between Joo Cheng and Lee, and there was no intention on the part of Joo Cheng to inflict the wound that was inflicted; in other words, Joo Cheng had no intention of stabbing Lee at the base of the neck and the wound inflicted was unintentional. The depth of the wound was only 6cm. This submission, in our opinion, ignores certain basic primary facts. Joo Cheng was armed with the knife, and he confronted and help up Lee with that weapon; Lee resisted and a struggle between them took place. Joo Cheng obviously used the knife to counter or overcome Lee's resistance, and in so doing, he stabbed Lee with the knife and stabbed Lee at the base of his neck, a vulnerable and vital part of the body. True it is that there is no direct evidence that he stabbed Lee by way of a downward thrust with the knife held in his right hand in a stabbing manner. However, having considered the evidence of Dr

Clarence Tan, the forensic pathologist, our inference is that the wound was inflicted by way of a downward thrust of the knife at the base of Lee's neck, and the wound so inflicted was intentional. According to Joo Cheng, Lee fell forward and onto him and his right hand holding the knife thrust forward and stabbed Lee. Assuming that Joo Cheng stabbed Lee in that manner (which we do not accept). Joo Cheng had the intention to thrust the knife forward at Lee in the region of Lee's neck; in other words, he had the intention to inflict the wound in the region of the neck and such a wound was inflicted. In the circumstances, we are unable to accept the contention that Joo Cheng did not intend to inflict that injury. In arriving at this conclusion, we adopt the test laid down by V Bose J in *Virsa Singh v The State of Punjab* AIR 1958 SC 465 at p 467, and he said:

In considering whether the intention was to inflict the injury found to have been inflicted, the enquiry necessarily proceeds on broad lines as, for example, whether there was an intention to strike at a vital or a dangerous spot and whether with sufficient force to cause the kind of injury found to have been inflicted. It is of course, not necessary to enquire into every last detail as for instance, whether the prisoner intended to have the bowels fall out, or whether he intended to penetrate the liver or the kidneys or the heart. Otherwise, a man who has no knowledge of anatomy could never be convicted, for if he does not know that there is a heart or a kidney or bowels, he cannot be said to have intended to injure them. Of course that is not the kind of enquiry. It is broad based and simple and based on common sense; the kind of enquiry that 'twelve good men and true' could readily and understand.

We therefore find that Joo Cheng intentionally inflicted the bodily injury that was inflicted on Lee, and that bodily injury was sufficient in the ordinary course of nature to cause death and did cause death.

[78] In *Mohamad Yassin v Public Prosecutor* [1994] 3 SLR 491, the court said, that:

The trial judge in his grounds of decision considered that the relevant statutory provision applicable to the charge was s 300(c) of the Penal Code. He held as follows:

It is now settled law (see *Tan Cheow Bock v Public Prosecutor* [1991] 3 MLJ 404) that when considering s 300(c) of the Penal Code, four matters have to be decided. They are: (1) what was the bodily injury that was present; (2) what was the nature of the injury; (3) was the injury sufficient in the ordinary course of nature to cause death; (4) did the accused intentionally cause the injury?

In the present case, there was no dispute on items (1)–(3), which are all objective inquiries. The issue was item (4); a subjective inquiry as to whether the accused had the intention to cause the fatal wound in Tan's (the deceased's) neck that caused his death.

Having identified the issue in item (4), the trial judge then went on to consider whether the appellant had the intention to inflict the fatal injury that was inflicted on the deceased's neck. In that connection, he followed the oft-quoted passage of V Bose J in *Virsa Singh v The State of Punjab* AIR 1958 SC 465 at p 467:

In considering whether the intention was to inflict the injury found to have been inflicted, the enquiry necessarily proceeds on the broad lines as, for example, whether there was an intention to strike at a vital or a dangerous spot and whether with sufficient force to cause the kind of injury found to have been inflicted. It is, of course, not necessary to enquire into every last detail as for instance, whether the prisoner intended to have the bowels fall out, or whether he intended to penetrate the liver or the kidneys or the heart. Otherwise, a man who has no knowledge of anatomy can never be convicted, for, if he does not know that there is a heart or a kidney or bowels, he cannot be said to have intended to injure them. Of course, that is not the kind of enquiry. It is broad based and simple and based on common sense …

With these principles in mind, the trial judge proceeded to review the evidence. In so doing, he rejected the evidence of the appellant. He said:

On a careful review of these facts in issue, taking into consideration all the circumstances in the case, I rejected the defence of the accused. The evidence I have summarised in these grounds of decision show that the accused's version in the witness box, that there was a struggle between both of them, cannot be accepted. *I was firmly of the view that this story the accused had put forward was prepared by him for the trial and was not the true account of what took place that morning at the landing of the spiral staircase*. (Emphasis added.)

The trial judge then found against the appellant as follows:

I was satisfied beyond reasonable doubt that what took place that day has to be pieced together from the statements the accused had given to the IO, notwithstanding that he had retracted in court that version of the incident. To begin with, what the accused said in his cautioned statement was true: he had no intention to kill Tan, he only wanted to cause hurt to him. This was because he was livid with Tan for having embarrassed him in front of his inmates, first over the table tennis game and later in the wash room. So, he wanted to get even with Tan. He sharpened the toothbrush last in the night. He made sure the point of the toothbrush was sharp enough to hurt a person. Next morning, he tucked the toothbrush in his waist. When he caught up with Tan at the staircase landing he took it (the toothbrush) out. With his right hand, from behind, he plunged the sharpened toothbrush into Tan's neck (see Dr Chui's evidence). There was a short struggle. Again, the accused drew the toothbrush above his right shoulder and this time caused injuries to Tan on his head. This evidence of the accused found in his s 122(1) statements is corroborated by the dying declaration of Tan who told his inmates in Hokkien that it was not gentlemanly to come from behind and that he had been stabbed by Yassin. However, because the accused had stabbed him front the back and it had caught him by surprise. Tan mistakenly thought that two persons had stabbed him.

The trial judge then came to the conclusion that:

On these facts, to my mind, the irresistible conclusion was that the accused had deliberately aimed to stab Tan in his neck. If he only wanted to draw blood to frighten Tan, he could have injured Tan on some other parts of his body, but he did

not do so. The accused had, therefore, intentionally caused the fatal stab wound. On the above facts, needless to say the defence of sudden fight was not available to the accused. For these reasons, I found the accused guilty and convicted him on the charge.

[79] In *Tan Cheow Bock v Public Prosecutor* [1991] 3 MLJ 404 the court said that:

> In our opinion, the law is not in doubt. *Virsa Singh*'s case AIR 1958 SC 465 is clear on s 300(c). V Bose J delivering the judgment of the Supreme Court said, at p 467:
>
> In considering whether the intention was to inflict the injury found to have been inflicted, the enquiry necessarily proceeds on the broad lines as, for example, whether there was an intention to strike at a vital or a dangerous spot and whether with sufficient force to cause the kind of injury found to have inflicted. It is of course not necessary to enquire into every last detail as, for instance, whether the prisoner intended to have the bowels fall out, or whether he intended to penetrate the liver or the kidneys or the heart. Otherwise, a man who has no knowledge of anatomy could never be convicted, for, if he does not know that there is a heart or a kidney or bowels, he cannot be said to have intended to injure them. Of course, that is not the kind of enquiry. It is broad based and simple and based on common sense: the kind enquiry that 'twelve good men and true' could readily appreciate and understand.
>
> To put it shortly, the prosecution must prove the following facts before it can bring a case under s 300(c):
>
> First, it must establish, quite objectively, that a bodily injury is present;
>
> Secondly, the nature of the injury must be proved. These are purely objective investigations;
>
> Thirdly, it must be proved that there was an intention to inflict that particular bodily injury, that is to say, that it was not accidental or unintentional, or that some other kind of injury was intended. Once these three elements are proved to be present, the enquiry proceeds further; and
>
> Fourthly, it must be proved that the injury of the type just described made up of the three elements set out above is sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender.
>
> Furthermore, in our opinion, the trial judge in *Public Prosecutor v Visuvanathan* [1978] 1 MLJ 159 also correctly analysed the position. At the risk of repetition, we adopt the following passage of their judgment at p 161:
>
> In our judgment for the application of cl (c) of s 300 of the Penal Code, all that the prosecution need prove is:
>
> (a) that the accused did an act which caused the death of the deceased;
>
> (b) that the said act was done with the intention of causing bodily injury;

(c) that the injury caused,

(i) was intended and was not accidental or otherwise unintentional; and

(ii) was sufficient in the ordinary course of nature to cause death.

There is no other requirement. In our opinion the submission of counsel for the defence based on Lord Diplock's dictum that 'the prosecution must also prove that the accused intended to cause some bodily injury to the victim of a kind which is sufficient in the ordinary course of nature to cause death' was untenable because such a requirement would make cl (c) otiose in view of the provisions of cl (a).

Since there was nothing to show us that the trial judges were wrong in finding that the appellant had intentionally (not accidentally) caused the injury which caused the death of the deceased, and in applying s 300(c), we dismissed the appeal.

[80] In *Public Prosecutor v Visuvanathan* [1978] 1 MLJ 159, the court said:

It seems to us that if there is an intention 'to cause some bodily injury to the victim of a kind which is sufficient in the ordinary course of nature to cause death', then the intention is to kill and in that event cl (c) would be unnecessary because the act would fall under cl (a) of s 300, namely:

(a) if the act by which death is caused is done with the intention of causing death.

In our opinion cll (a) and (c) of s 300 are meant to cover different acts ie acts done with different intentions. The cases show that cl (c) is meant to apply in circumstances where the assailant had no intention of causing death but has nevertheless intentionally (and not accidentally) inflicted a bodily injury sufficient in the ordinary course of nature to cause death. Under cl (c) once the intention to cause the bodily injury actually found to be present is proved the rest of the enquiry ceases to be subjective and becomes purely objective and the only question is whether, as a matter of purely objective inference, the injury is sufficient in the ordinary course of nature to cause death. It is irrelevant and totally unnecessary to enquire what kind of injury the accused intended to inflict. The crucial question always is, was the injury found to be present intended or accidental. As was observed by Bose J in *Virsa Singh*'s case at p 476:

It does not matter that there was no intention … to cause injury of a kind that is sufficient to cause death in the ordinary course of nature.

And at p 478:

… the question, so far as the intention is concerned, is not whether he intended … to inflict an injury of a particular degree of seriousness, but whether he intended to inflict the injury in question.

The matter is clarified further by Hidayatullah J in *Rajwant Singh*'s case at p 1878:

> … if the injury the offender intends causing and does cause is sufficient to cause death in the ordinary course of nature, the offence is murder whether the offender intended causing death or not and whether the offender had a subjective knowledge of the consequences or not …

[81] In *Mimi Wong & Anor v Public Prosecutor* [1972] 2 MLJ 75 the court said:

> Although we agree that there has been a misdirection of law on the part of the trial judges we have to consider the deputy public prosecutor's submission to us to apply the proviso contained in s 54 of the Supreme Court of Judicature Act (Cap 15 1970 Ed) which provides that this court:
>
> … may notwithstanding that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has occurred.
>
> He relies on the trial judges' findings that the fatal injuries were knife injuries deliberately, not accidentally, inflicted by the first appellant with great force on vital parts of the deceased's body. He submits that on the whole of the evidence and where the first appellant's defence at the trial that she did not inflict the knife injuries was rejected, the conclusion is inescapable, and the only inference possible on the facts, was that she intended to inflict the two fatal injuries found on the neck and abdomen of the deceased and that those two injuries were not accidental nor otherwise unintentional. The point raised is a novel one and a difficult one to resolve having regard to the circumstances of the present case. On the evidence before them the trial judges, having arrived at the findings of fact we have just outlined, apparently omitted to consider whether or not the first appellant had the intention to inflict the fatal injuries present. We are of the opinion, based purely on the trial judges' other findings of fact and their rejection of the first appellant's defence, that any reasonable jury, had there been a jury, on those proved facts, and particularly the findings that she deliberately, not accidentally, inflicted the fatal injuries with great force on vital parts of the body, would undoubtedly have gone on to draw the inference that the first appellant intended to inflict the fatal injuries found on the deceased. Indeed, the inference that she intended those injuries is irresistible.
>
> (Emphasis added.)

Clause (a)

[82] In the present appeal, the 'intention to cause death' of the deceased could be inferred from the fact that both the appellants delivered the injuries causing the death of the deceased. PW14 agreed that these injuries were caused by the wooden baseball bat.

[83] From the circumstances, the acts of causing the injuries on the vital parts of the deceased's body with the deadly weapon must necessarily be held to be evidence of the intention of the appellants to cause his death, thus attracting cl (a) of s 300 of the Penal Code.

Clause (c)

[84] It is settled law that when considering s 300(c) of the Penal Code, the court must decide four matters, namely:

(a) what was the bodily injury that was present;

(b) what was the nature of the injury;

(c) was the injury sufficient in the ordinary course of nature to cause death; and

(d) did the accused intentionally cause the injury.

[85] The items (a)–(c) are all objective inquiries whilst item (d) is a subjective inquiry.

[86] Items (a)–(c) have been discussed above. The deceased sustained injuries most prominently on the head. These injuries are fatal injuries (evidence of PW14) and caused by the wooden baseball bat.

[87] After having considered the issues in items (a)–(c) above, the court then had to consider whether the appellants had the intention to inflict the fatal injuries that were inflicted on the deceased's body. In considering whether there was an intention to inflict the injuries, the enquiry necessarily proceeds on broad lines for example as to whether there was an intention to strike at a vital or a dangerous spot on the deceased's body and whether there was sufficient force to cause the kind of injury found to have been inflicted. If there is no such intention on the part of the accused and his accomplice, then why did he to deliberately hit the deceased on two fatal areas that are the head and the chest? Such deliberation is one of an irresistible conclusion which must be drawn to such an intention.

[88] From the facts and evidence before us, it is clear that the appellants had intentionally caused the fatal injuries on the dangerous or vital spot of the deceased's body. Thus, cl (c) to s 300 of the Penal Code had been fulfilled.

[89] The appellants knew that the injuries inflicted were sufficient in the ordinary cause of nature to cause death, more particularly, causing fatal injuries to the vital part of the body, ie the head. There is also evidence to show that the

deceased suffered multiple injuries over his body.

Clause (d)

[90] In any event, as regards to cl (d) of s 300 of the Penal Code, the first appellant did not strike the blow on the deceased with a deadly weapon, he must be taken to know that he did the act which would be imminently dangerous to the life of the deceased who was struck and that a probable result of his acts would be cause the death of the deceased. Thus, such acts fall under cl (d) of s 300 of the Penal Code.

[91] The intention could be inferred from the fact that after committing the crime, both appellants left the scene and came back later to the scene of the crime just to confirm that the deceased was dead a short while ago. They then left him there until they were arrested a week later in Rengit.

[92] In *Public Prosecutor v Reza Mohd Shah bin Ahmad Shah* [2002] 4 MLJ 13, the court held:

> (2) The court is entitled to infer knowledge on the part of a person on the assumption that such a person has the ordinary understanding expected of him. The court is not concerned with the knowledge of a reasonable man but with reasonable inference to be drawn from a situation. There are many circumstances from which knowledge can be inferred. One instance is the inference to be drawn from the act of a person in absconding or fleeing from the scene of crime.

Section 8 of the Evidence Act 1950: subsequent conduct of the accused after the incident

[93] It is in evidence that after the commission of the crime at the scene of crime, the appellants came back half an hour later to ascertain whether the deceased is dead. After they confirmed that he did not move and is truly dead, they ran away from the arms of the law and were missing until they were arrested on the 28 December 2002. These are subsequent conduct of the appellants which are relevant under s 8 of the Evidence Act 1950.

[94] Section 8 of the Evidence Act states as follows:

> Section 8 Motive, preparation and previous or subsequent conduct
>
> (1) Any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact.
>
> (2) The conduct of any party, or of any agent to any party, to any suit or proceeding in reference to that suit or proceeding, or in reference to any fact in issue therein or relevant thereto, and the conduct of any person an offence against whom is

the subject of any proceeding, is relevant if the conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto.

Explanation 1 — The word 'conduct' in this section does not include statements unless those statements accompany and explain acts other than statements; but this explanation is not to affect the relevancy of statements under any other section of this Act.

Explanation 2 — When the conduct of any person is relevant any statement made to him or in his presence and hearing which affects his conduct is relevant.

ILLUSTRATIONS

(a) *A* is tried for the murder of *B*.

The facts that *A* murdered *C*, that *B* knew that *A* had murdered *C* and that *B* had tried to extort money from *A* by threatening to make his knowledge public are relevant.

(b) *A* sues *B* upon a bond for the payment of money. *B* denies the making of the bond.

The fact that at the time when the bond was alleged to be made *B* required money for a particular purpose is relevant.

(c) *A* is tried for the murder of *B* by poison.

The fact that before the death of *B*, *A* procured poison similar to that which was administered to B is relevant.

(d) The question is whether a certain document is the will of *A*.

The facts that not long before the date of the alleged will *A* made inquiry into matters to which the provisions of the alleged will relate, that he consulted lawyers in reference to making the will, and that he caused drafts of other wills to be prepared of which he did not approve are relevant.

(e) *A* is accused of a crime.

The facts that either before or at the time of or after the alleged crime *A* provided evidence which would tend to give to the facts of the case an appearance favourable to himself, or that he destroyed or concealed evidence or prevented the presence or procured the absence of persons who might have been witnesses or suborned persons to give false evidence respecting it are relevant.

(f) The question is whether *A* robbed *B*.

The facts that after *B* was robbed, *C* said in *A*'s presence: 'The police are coming to look for the man who robbed *B*' and that immediately afterwards *A* ran away are relevant.

(g) The question is whether *A* owes *B* RM10,000.

The facts that *A* asked *C* to lend him money, and that *D* said to *C* in *A*'s presence and hearing: 'I advise you not to trust *A* for he owes *B* RM10,000,' and that *A* went away without making any answer are relevant facts.

(h) The question is whether *A* committed a crime.

The fact that *A* absconded after receiving a letter warning him that inquiry was being made for the criminal and the contents of the letter are relevant.

(i) A is accused of a crime.

The facts that after the commission of the alleged crime he absconded, or was in possession of property or the proceeds of property acquired by the crime, or attempted to conceal things which were or might have been used in committing it are relevant.

(j) The question is whether *A* was ravished.

The facts that shortly after the alleged rape she made a complaint relating to the crime, the circumstances under which and the terms in which the complaint was made are relevant.

The fact that without making a complaint she said that she had been ravished is not relevant as conduct under this section, though it may be relevant — (i) as a dying declaration under section 32(1)(a); or

(i) as a dying declaration under section 32(1)(a); or

(ii) as corroborative evidence under section 157.

(k) The question is whether *A* was robbed.

The fact that soon after the alleged robbery he made a complaint relating to the offence, the circumstances under which and the terms in which the complaint was made are relevant.

The fact that he said he had been robbed without making any complaint is not relevant as conduct under this section, though it may be relevant

(i) as a dying declaration under section 32(1)(a); or

(ii) as corroborative evidence under section 157.

[95] In view of the foregoing reasons, looking at the facts and evidence in its entirety, the prosecution had proven its case against the appellants.

[96] Per Raja Azlan Shah J (as His Highness then was) in *Chandrasekaran & Ors v Public Prosecutor* [1971] 1 MLJ 153 at p 160 (HC):

> The evidence of subsequent conduct is relevant under s 8 of the Evidence Ordinance and may properly be taken into account, after the prosecution has established the guilt of the accused, to reinforce the satisfaction of the court as to the proof of guilt made out by the prosecution case (see *Chandika Prasad v Emperor* 126 IC 684).

COMMON INTENTION

[97] The facts and circumstances of this case as discussed above clearly

showed the element of common intention among the appellants. It is clear as night follows day that they had consensus to commit the crime as they participated in doing the act or acts in furtherance of the common intention of s 34 of the Penal Code which states:

> … each of several persons liable for an act done by all, in like manner as if done by him alone.
>
> 34 When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act were done by him alone.

The doctrine of combination in crime

[98] According to Bishop, 'when two or more persons unite to accomplish a criminal object, whether through the physical volition of one, or of all, proceeding severally or collectively, each individual whose will contributed to the wrongdoing is in law responsible for the whose, in the same way as though performed by himself alone': Bishop, JP, *Criminal Law*, Vol 1, (3rd Ed), s 439.

[99] Thus, every person whose evil intent contributed to a criminal act and who becomes a party to the commission of crime, howsoever insignificant his role may, in law, be guilty of the whole crime.

[100] In *Gorachand Gopi* (1860) BLR 443, Sir Barnes Peacock J observed:

> When several persons are in company together engaged in one common purpose, lawful or unlawful, and one of them, without the knowledge and consent of the others, commits an offence the others will not be involved in the guilty unless the act was in some manner in furtherance of the common intention.

[101] The Privy Council also stated in *Ganesh Singh v Ram Pooja* (1869) 3 BLR 44 (PC):

> When parties go with a common purpose to execute a common object each and every one becomes responsible for the acts of each and every other in execution and in furtherance of their common purpose; as the purpose is common so must be the responsibility.

Ingredients of joint liability

[102] To attract the principle of joint liability under s 34, there should be:

(a) some criminal act;

(b) which is done by more than one person;

(c) which criminal act is done by such persons;

(d) the common intention is in the sense of a pre-arranged plan between such persons;

(e) there is participation in some manner in the act constituting the offence by the persons sought to be prosecuted; and

(f) there is physical presence at the time of commission of crime of all the persons; but physical presence of all is not necessary in some cases.

[103] In *Juraimi bin Husin v Public Prosecutor* [1998] 1 MLJ 537; [1998] 1 AMR 758 Gopal Sri Ram JCA said, on behalf of the Court of Appeal:

> Common intention
>
> The law governing criminal liability under s 34 of the Penal Code was explained by Hashim Yeop A Sani J (late CJ Malaya), in *Dato Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232 at p 267 as follows:
>
> Under s 34 of the Penal Code, to succeed the prosecution must prove that the criminal act was done in concert pursuant to the prearranged plan or arrangement. In practice it is of course difficult to produce direct evidence to prove the intention of an individual. In most cases, however, it can be inferred from his act or conduct other relevant circumstances of the case. See *Mahbub Shah v Emperor* (1945) LR 721 IA 148 at p 153. The doctrine of common intention is as expressed in s 34 of the Penal Code itself which reads
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> …
>
> It is also a common sense principle that is two or more persons intentionally do a thing jointly it is just the same as if each of them had done it individually. If two or more persons combine in injuring another in such a manner that each person engaged in causing the injury must know that he result of such injury may be the death of the injured person, it is no answer on the part of anyone of them to allege, and perhaps prove, that his individual act did not cause death, and that by his individual act he cannot be held to have intended death. Everyone must be taken to have intended the probable and natural results of the combination of acts in which he joined.
>
> Thus it is clear that the leading feature of s 34 of the Penal Code is the element of participation in action. Two preliminary elements are in fact necessary to fulfill the requirements of s 34. First, there must be evidence (direct or by inference) the accused was present at the scene of the crime. Secondly, there must be evidence to show that there was prior concert or a prearranged plan involving the accused. This is logical because how can there be participation without physical presence? Even passive participation may require physical presence.

Having carefully scrutinised the summing up of the learned trial judge, we are unable to agree with the argument of counsel that the jury was misdirected on the issue of common intention. Indeed, we are satisfied that the learned trial judge's direction on the point was entirely adequate in the circumstances of the case. Accordingly, we reject the sixth ground of complaint advanced on behalf of the second and third accused.

[104] In *Public Prosecutor v Krishna Rao a/l Gurumurthi & Ors* [2000] 1 MLJ 274, Kang Hwee Gee J said:

Common intention — the requirement of s 34 of the Penal Code

Having drawn the presumptions, it would now be necessary to consider whether on the evidence tendered the element of common intention under s 34 of the Penal Code could be attributed to the accused.

Quite simply, common intention is concerned with the principle of joint liability in penal law the principle of which has been set out in numerous judgments in our jurisdiction. However as illustration, I propose to quote, for the clarity on the law that it propounds, from the recent Singapore Court of Appeal case of *Shaiful Edham bin Adam & Anor v Public Prosecutor* (Criminal Appeal No 13 of 1988), Court of Appeal, Singapore (Yong Pung How CJ (Singapore), LP Thean JA, Tan Lee Meng J) as reported in the April 1999 Issue of *Mallal's Current Law* in the following three passages:

(1) Section 34 of the Penal Code embodied the principle of joint liability being the existence of a common intention. By s 33 the word 'act' denoted a series of omissions as well as a single omission. It followed that words in s 34 'when a criminal act is done by several persons' could be construed to mean 'when criminal acts are done by several persons'. Thus, where different acts in a criminal enterprise were committed by several participants, such participants could still be regarded as having done ' a criminal act' for the purposes of liability under s 34. The raison d'etre of s 34 was to meet the situation here it was difficult if not impossible, to distinguish between the acts of each individual member of a party or to prove precisely what part was played by each of them. Section 34 operated to impute liability to a participant whose participation contributed to the result though he could not be proved to have committed the actus reus himself.

(2) All that was necessary for the prosecution to prove was that there was in existence a common intention between all the persons involved to commit a criminal act and that the act which constituted the offence charged (the 'criminal act' referred to in s 34 of the Penal Code) was committed in furtherance of that criminal act. It was not necessary to prove that there had to be a common intention to commit the crime actually committed;

(3) The rider to this proposition was that the participants must have had some knowledge that an act may be committed which would be consistent with or in furtherance of, the common intention.

[105] A thorough explanation was given on the usage of common intention by Yong Pung How CJ in *Shaiful Edham bin Adam & Anor v Public Prosecutor* [1999] 2 SLR 57 which was followed by Justice Kang Hwee Gee as shown above. Justice Yong held:

> The common intention point — the law
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> 50 Section 34 of the Penal Code (Cap 224) ('the Penal Code') which embodies the principle of joint liability in the doing of a criminal act, the essence of that liability being the existence of a common intention, reads as follows:
>
> When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act were done by him alone.
>
> It is not without significance that the original draft of the Indian Penal Code did not contain the phrase 'in furtherance of the common intention of all'. The words were inserted by s 1 of Act xxvii of 1870 (India). When the Indian Penal Code was introduced into the Straits Settlements in 1872 and the federated and unfederated Malay States, the section as amended was also received.
>
> 51 Section 33 states that the word 'act' denotes a series of acts as well as a single act; and the word 'omission' denotes a series of omissions as well as a single omission. It follows that the words in s 34 'when a criminal act is done by several persons' may be construed to mean 'when criminal acts are done by several persons'. Thus, where different acts in a criminal enterprise are committed by different participants, such participants may still be regarded as having done 'a criminal act' for the purposes of liability under s 34. The raison d'etre, as it were, of s 34 was to meet the situation where it may be difficult, if not impossible, to distinguish between the acts of each individual member of a party or to prove precisely what part was played by each of them. Section 34 operates to impute liability to a participant whose participation contributed to the result, though he cannot be proved to have committed the actus reus himself. This was recognised by Lord Sumner in the Privy Council decision in *Barendra Kumar Ghosh v Emperor* AIR 1925 PC 1 at p 5:
>
> The doing to death of one person at the hands of several by blows or stabs, under circumstances in which it can never be known which blow or blade actually extinguished life, if indeed one only produced that result is common in criminal experience and the impossibility of doing justice, if the crime in such cases is the crime of attempted murder only, has been generally felt. It is not often that a case is found where several shots can be proved and yet there is only one wound, but even in such circumstances it is obvious that the rule ought to be the same as in the wider class, unless the words of the Code clearly negative it. Of course questions arise in such cases as to the extent to which the common intention and the common contemplation of the gravest consequences may have gone, and participation in a joint crime, as distinguished from mere presence at the scene of its commission, is often a matter not easy to decided in complex states of fact, but the rule is one that has never left the Indian courts in much doubt.

52 The problem is to define the conditions under which liability is to be imposed. In this respect, s 34 has had a chequered interpretation, though the position is not now in doubt due to the numerous judgments (which we will refer to in due course) in which the leading authorities have been stated and restated. At the outset, however, the controversy had its genesis in the words 'criminal act' and 'common intention' contained in s 34. This found expression in two divergent lines of authority. On the one hand there were those authorities (*R v Vincent Banka* [1936] MLJ 53 is always cited) which held that the common intention should refer to the crime actually committed and that it was not sufficient that there should be merely a common intention to 'behave criminally'. On the other hand there were those authorities which took a wider view of the expression 'criminal act': it was not necessary to show that there existed a common intention to commit the crime actually committed and for which the accused were ultimately charged; it was sufficient so long as the criminal act complained of was committed in furtherance of the common intention. Really the difference in the two views, as will be shown, lies in the content of the expression 'common intention'. We propose to discuss the elements of s 34 under the following headings: (1) common intention; (2) 'in furtherance of the common intention of all'; and (3) participation in the criminal act.

(1) Common intention

53 In *Vincent Banka*, the two appellants were charged with committing robbery and murder in the course of robbery. Evidence was inconclusive as to which of the two appellants had carried the knife or inflicted the fatal wound. They were convicted on both charges and appealed against their convictions for murder. The appeal was allowed. Huggard CJ said at p 69:

It follows that it is the duty of the trial judge, in cases where s 34 of the Penal Code is relied on, to direct the attention of the jury to any evidence from which they may legitimately infer the existence of a common intention to commit the criminal act actually committed; at the same time making it clear that the question whether or not such common intention existed is a question of fact and is for them to determine.

And at p 70:

… under the terms of that section (ie s 34 of the Penal Code) as has already been pointed out, there must exist a common intention to commit the crime actually committed, and it is not sufficient that there should be merely a common intention to 'behave criminally'.

It was clear that the two appellants had set out to commit robbery. Regarding the murder, however, evidence was inconclusive as to who had carried the knife or inflicted the fatal wound. Applying the test enunciated by Huggard CJ, the court held that there must be evidence that there was a common intention between the robbers not merely to commit robbery but also, if necessary, to kill the deceased. Since there was no evidence of any express agreement between the Appellants that a knife should be carried or that the victim should be stabbed, the court convicted them only of robbery and acquitted them of murder.

54 The fallacy in this kind of reasoning was demonstrated by Lord Sumner in *Barendra Kumar Ghosh v Emperor*, the leading Indian authority. The facts were that the appellant, together with a few others, had gone to a post office in Bengal to demand money from the subpostmaster. All of them fired at the subpostmaster with their pistols. He was hit in two places and died almost instantly. The appellant was arrested after the others fled. The trial judge directed the jury that the appellant might be the man who fired the fatal shot and that if the jury were satisfied that the subpostmaster had been killed in furtherance of the common intention of all, the appellant was guilty of murder whether he fired the fatal shot or not. The appellant was convicted of murder by the jury. Lord Sumner said at pp 5–6 and 9 of the report:

> The appellant's argument is, in brief, that in s 34, 'a criminal act', in so far as murder is concerned, means an act which takes life criminally within s 302, because the section concludes by saying 'is liable for that act in the same manner as if the act were done by himself alone', and there is no act done by himself alone, which could make a man liable to be punished as a murderer, except an act done by himself and fatal to his victim.
>
> Thus the effect is that, where each of several persons does something criminal, all acting in furtherance of a common intention, each is punishable for what he has done as if he had done it by himself. Such a proposition was not worth enacting, for, if a man has done something criminal in itself, he must be punishable for it, and none the less so that others were doing other criminal acts of their own at the same time and in furtherance of an intention common to all.
>
> It follows from the appellant's argument that the section only applies to cases where several persons (acting in furtherance of a common intention) do some fatal act, which one could do by himself.
>
> Criminal action, which takes the form of acts by several persons, in their united effect producing one result, must then be caught under some other section and, except in the case of unlawful assembly, is caught under attempts or abetment.
>
> By way of illustration it may be noted that, in effect, this means, that if three assailants simultaneously fire at their victim and lodge three bullets in his brain, all may be murderers, but, if one bullet only grazes his ear, one of them is not a murderer and, each being entitled to the benefit of the doubt, all must be acquitted of murder, unless the evidence inclines in favour of the marksmanship of two or of one.
>
> This argument evidently fixes attention exclusively upon the accused person's own act. Intention to kill and resulting death accordingly are not enough; there must be proved an act which kills, done by several persons and corresponding to, if not identical with, the same fatal act done by one. The answer is that, if this construction is adopted, it defeats itself, for several persons cannot do the same act as one of them does. They may do acts identically similar, but the act of each is his own, and because it is his own and is relative to himself, it is not the act of another, or the same as that other's act. The result is that s 34, construed thus, has no content and is useless. …

He then outlined a hypothetical situation to illustrate his point:

Suppose two men tie a rope round the neck of a third and pull opposite ends of the rope till he is strangled. This they said really is an instance of a case under s 34. Really it is not. Obviously each is pulling his own end of the rope, with his own strength, standing in the position that he chooses to take up, and exerting himself in the way that is natural to him, in a word in a way that is his. Let it be that in effect each pulls as hard as the other and at the same time and that both equally contribute to the result.

Still the act, for which either would be liable, is done by himself alone, is precisely not the act done by the other person.

There are two acts, for which both actors ought to suffer death, separately done by two persons but identically similar. Let us add the element, that neither act without the other would have been fatal; so that the fatal effect was the cumulative result of the acts of both.

Even this does not make either person do what the other person does: it merely makes the act, for which he would be liable if done by himself alone, an attempt to murder and not an act of murder, and accordingly the case is not an illustration of s 34. …

On the other hand, if it is read as the appellant reads it, then, returning to the illustration of the rope, if both men are charged together but each is to be made liable for his act only and as if he had done it by himself, each can say that the prosecution has not discharged its onus, for no more is proved against him than an attempt, which might not have succeeded in the absence of the other party charged. Thus both will be acquitted of murder, and will only be convicted of an attempt, although the victim is and remains a murdered man.

And ended by saying:

If s 34 was deliberately reduced to the mere simultaneous doing in concert of identical criminal acts, for which separate convictions for the same offence could have been obtained, no small part of the cases which are brought by their circumstances within participation and joint commission would be omitted from the Code altogether.

If the appellant's argument were to be adopted, the Code, during its early years, before the words 'in furtherance of the common intention of all' were added to s 34, really enacted that each person is liable criminally for what he does himself, as if he had done it by himself, even though others did something at the same time as he did. This actually negatives participation altogether and the amendment was needless, for the original words express all that the appellant contends that the amended section expresses. One joint transaction by several is merely resolved into separate several actions, and the actor in each answers for himself, no less and no more than if the other actors had not been there. …

Instead of enacting in effect that participation as such might be ignored, which is what the argument amounts to, the amending section said that, if there was action in furtherance of a common intention, the individual came under a special liability thereby, a change altogether repugnant to the suggested view of the original section. (Emphasis added.)

Really the amendment is an amendment, in any true sense of the word, only if the original object was to punish participants by making one man answerable for what another does, provided what is done is done in furtherance of a common intention, and if the amendment then defines more precisely the conditions under which this vicarious or collective liability arises. In other words, 'a criminal act' means that unity of criminal behaviour, which results in something, for which an individual would be punishable, if it were all done by himself alone, that is, in a criminal offence. (Emphasis added.)

55 We also found the remarks of *Sir Madhavan Nair in Mahbub Shah v Emperor* 1945 AIR PC 118 at p 120 instructive:

Section 34 lays down a principle of joint liability in the doing of a criminal act. The section does not say 'the common intentions of all' nor does it say 'an intention common to all'. Under the section, the essence of that liability is to be found in the existence of a common intention animating the accused leading to the doing of a criminal act in furtherance of such intention. To invoke the aid of s 34 successfully, it must be shown that the criminal act complained against was done by one of the accused persons in the furtherance of the common intention of all; if this is shown, then liability for the crime may be imposed on any one of the persons in the same manner as if the act were done by him alone.

56 *Barendra Kumar Ghosh* and *Mahbub Shah* were approved and adopted by the Court of Criminal Appeal in *Wong Mimi & Anor v Public Prosecutor* [1972–1974] 1 SLR 73 and *Public Prosecutor v Neoh Bean Chye & Anor* [1975] 1 MLJ 3; [1972–1974] 1 SLR 213. The court disapproved of *Vincent Banka*, a decision of the Court of Criminal Appeal of the Straits Settlements and held that it was not incumbent on the prosecution to prove that there existed between the participants a common intention to commit the crime actually committed. For s 34 to apply it was sufficient to prove that there was in existence a common intention between all the persons who committed the criminal act and that the act which constituted the offence charged was done in furtherance of that common intention. In *Wong Mimi*'s case, Wee Chong Jin CJ who delivered the judgment of the court explained the effect of s 34 of the Penal Code in the following terms at pp 78–79:

There is no doubt that for this section to apply there must be in existence a common intention between all the persons who committed the criminal act, and that a criminal act be done in furtherance of that common intention. When these two requirements are proved, each of such persons would be liable for the entire criminal act in the same manner as if he had done it alone.

It is clear from the Privy Council's (in *Barendra Kumar Ghosh*) interpretation of the words 'criminal act' that it is the result of a criminal act which is a criminal offence. It then remains, in any particular case, to find out the actual offence constituted by the 'criminal act'. If the nature of the offence depends on a particular intention, the intention of the actual doer of the criminal act has to be considered. What this intention is will decide the offence committed by him and then s 34 applies to make the others vicariously or collectively liable for the same offence. The intention that is an ingredient of the offence constituted by the criminal act is the intention of the actual doer and must be distinguished from the common intention of the doer and his confederates. It may be identical with the common intention or it may not.

Where it is not identical with the common intention, it must nevertheless be consistent with the carrying out of the common intention, otherwise the criminal act done by the actual doer would not be in furtherance of the common intention. Thus if A and B form a common intention to cause injury to C with a knife and A holds C while B stabs C deliberately in the region of the heart and the stab wound is sufficient in the ordinary course of nature to cause death, B is clearly guilty of murder. Applying s 34 it is also clear that B's act in stabbing C is in furtherance of the common intention to cause injury to C with a knife because B's act is clearly consistent with the carrying out of that common intention and as their 'criminal act', ie that unity of criminal behaviour, resulted in the criminal offence of murder punishable under s 302, A is also guilty of murder.

In *Wong Mimi*, the first appellant was convicted of the murder of one Mrs Watanabe (whose husband she was having an affair with). The second appellant, the first appellant's husband, was also convicted of murder under s 302 read with s 34 of the Penal Code. The facts were that when the first appellant went to the deceased's house, she brought with her a knife which she subsequently used to inflict the fatal injury. So far as the part played by the second appellant was concerned, the court accepted the findings of the trial judges (at p 77 of the report):

… that the idea of throwing the detergent came from him; that he brought the Glucolin tin containing the detergent; that he requested the first appellant to lure the deceased to the bathroom on the pretext of inspecting the broken wash basin; that he mixed water with the detergent; that he wrapped a towel round the Glucolin tin to prevent leaving finger prints on it; that he threw the detergent into the eyes of the deceased after he saw the first appellant had taken a knife and was ready to stab the deceased and that he was clearly a party to the stabbing of the deceased.

One of the arguments advanced on behalf of the second appellant was that s 34 should only be applied if the common intention of the accused was to commit the offence with which they were charged. In other words, the second appellant could not be found guilty of an offence under s 302 of the Penal Code unless the common intention of the appellants was to cause the death of the deceased, or was such other intention as is mentioned in s 300 of the Code. The court had no difficulty in rejecting this argument and held that s 34 had been properly applied vis-a-vis the second appellant. In *Neoh Bean Chye*, the first appellant knew that the second appellant had a loaded revolver and that it would be used, if necessary, during the course of the robbery. He himself had loaded the gun and handed it to the second appellant who shot the deceased when he offered resistance during the robbery. The first Appellant's conviction for murder under s 302 read with s 34 of the Penal Code was upheld by the court.

57 On this view, all that it is necessary for the prosecution to prove is that there was in existence a common intention between all the persons involved to commit a criminal act and that the act which constituted the offence charged (the 'criminal act' referred to in s 34 of the Penal Code) was committed in furtherance of that criminal act. The rider to this is that the participants must have some knowledge that an act may be committed which is consistent with or would be in furtherance of, the common intention. Support for this approach may be found in the words of Desai J in *Bashir v State of Allahabad* AIR 1953 All 668 at p 672:

These words ('in furtherance of the common intention') were added by the Legislature in 1870 and must have been added for a purpose. That purpose could be none other than to make persons, acting in concert, liable for an act, which is not exactly the act intended by them, but has been done in furtherance of their common intention. The words would not have been required at all if the common intention implied an intention to do the very criminal act done.

It will be recalled that Lord Sumner had made the same point in *Barendra Kumar Ghosh*. Applying this test to *Neoh Bean Chye*, the offence for which the appellants were ultimately charged (murder) was done in furtherance of their common intention to commit a criminal act (robbery); they also knew that the victim might be shot if he offered any resistance. They were clearly guilty of an offence under s 302 read with s 34 of the Penal Code.

58 A note of caution must be sounded before we move on to the second element of s 34. Common intention means a prior meeting of the minds and must be distinguished from same or similar intention. In *Mahbub Shah*, the appellant and one Wali Shah were out shooting game when they heard shouts for help from one Ghulam Quasim Shah who was being attacked by the deceased, Alla Dad (Ghulam had tried to get back from Alla Dad the reeds which the latter had unlawfully taken from the lands of Ghulam's uncle). Wali Shah in trying to rescue Ghulam shot and killed Alla Dad while the appellant injured one Hamidullah Khan. Both the appellant and Wali Shah were convicted under s 302 read with s 34. The Privy Council in allowing the appeal, said that while the appellant and Wali Shah had the same or similar intention to rescue Ghulam by using their guns if necessary, there was no evidence that the killing of Alla Dad was in furtherance of a common intention. Sir Madhavan Nair said at p 121 of the report:

Their Lordships are prepared to accept that the appellant and Wali Shah had the same intention, viz, the intention to rescue Quasim if need be by using the guns and that, in carrying out this intention, the appellant picked out Hamidullah for dealing with him and Wali Shah, the deceased, but where is the evidence of common intention to commit the criminal act complained against, in furtherance of such intention?

Their Lordships find none. Evidence falls far short of showing that the appellant and Wali Shah ever entered into a premeditated concert to bring about the murder of Alla Dad in carrying out their intention of rescuing Quasim Shah. Care must be taken not to confuse same or similar intention with common intention; the partition which divides their 'bounds' is often very thin; nevertheless, the distinction is real and substantial, and if overlooked will result in miscarriage of justice.

In Their Lordships' view, the inference of common intention within the meaning of the term in s 34 should never be reached unless it is a necessary inference deducible from the circumstances of the case.

(2) 'In furtherance of the common intention of all'

59 The first point to be made here is that the 'criminal act' done by one of the accused must be 'in furtherance of the common intention of all'. However, as discussed above, this does not mean that there must be a common intention to

commit the criminal act actually committed and for which the accused is ultimately charged. The learned authors Ratanlal and Dhirajlal, in their *Law of Crimes*, (1997) at p 122 para 28 divide acts done in furtherance of the common intention into three categories. In the first category are those acts which are directly intended by all the confederates. In the second are acts which in the circumstances leave no doubt that they are to be taken as included in the common intention, although they are not directly intended by all the confederates. And in the third are acts which are committed by any of the confederates in order to avoid or remove any obstruction or resistance put up in the way of the proper execution of the common intention. The third category of acts may cause difficulties as the individual doer in doing the act or acts may produce results or consequences not intended by the others.

60 The second and more important point is that the common intention must precede the criminal act: see, eg *Asogan Ramesh s/o Ramachandren & Ors v Public Prosecutor* [1998] 1 SLR 286. In this connection, the question is whether or not there must be found a pre-arranged plan in determining whether the 'criminal act' was done 'in furtherance of the common intention'. In *Mahbub Shah*, the Privy Council held that common intention implies the existence of a pre-arranged plan. Sir Madhavan Nair said at p 120:

… it is clear to Their Lordships that common intention within the meaning of the section implies a pre-arranged plan, and to convict the accused of an offence applying the section it should be proved that the criminal act was done in concert pursuant to the pre-arranged plan. As has been often observed, it is difficult if not impossible to procure direct evidence to prove the intention of an individual; in most cases it has to be inferred from his act or conduct or other relevant circumstances of the case.

However, the difficulty of proving a pre-arranged plan was noted by Baguley J in the Rangoon case of *Nga Aung Thein & Anor* 1955 AIR Ran 89 (FB) 90. He did not think it was an essential precondition:

It seems that the condition precedent suggested in the question, namely, a pre-arranged intention to commit murder, a pre-arrangement which from the nature of things in the vast majority of cases it would be absolutely impossible to prove, is not essential ….

Indeed, the requirement of a pre-arranged plan, if it can be so called, has been qualified to a large extent. In *Bashir*, the court clarified Sir Madhavan Nair's statement in *Mahbub Shah* at p 671 as follows:

In *Mahbub Shah* 'common intention' was held to imply a 'pre-arranged plan'. This does not mean either that there should be confabulation, discussion and agreement in writing or by word, nor that the plan should be arranged for a considerable time before the doing of the criminal act. The judicial committee in the case of *Mahbub Shah*, did not lay down that a certain interval should elapse between the formation of a pre-arranged plan and the doing of the criminal act and did not negative the formation of a pre-arranged plan just a moment before the doing of the criminal act.

A See also *Krishna Govind Patil v State of Maharashtra* [1963] 2 Cri LJ 351 at p 352 and *(1) Namasiyiam (2) Rajindran (3) Goh Chin Peng, and (4) Ng Ah Kiat v Public Prosecutor* [1987] 2 MLJ 336 at pp 344–345 to the same effect. Thus pre-arrangement need not exist in the sense of a prior plan. The plan could develop on the spot. What is required, however, is a meeting of the minds or acting in concert. Since it would in most cases be virtually impossible to prove a pre-arranged B plan, failure to do so is of no consequence. Instead, 'common intention' is to be inferred from all the facts and circumstances of the case, including the conduct of the accused. Thus in *Nga Aung Thein*, in the context of robbery and murder, Baguley J said that:

C … it is sufficient if the court is of opinion that from all the facts proved, the way in which the robbery was carried out, the weapons with which the robbers were armed, … the characters of the robbers themselves, and so on, a legitimate inference can be drawn that the robbers went out to commit robbery and, if necessary, to kill, and that death resulted in consequence of what they as a band did.

D Similarly, the same sort of considerations applied in *Wong Mimi*. The throwing of the detergent in the deceased's eyes at the critical moment when the first appellant was about to stab her was to prevent any resistance on her part, and certainly showed some strategy on the part of the second appellant which was not inconsistent with the killing. However, Desai J in *Bashir* warned that:

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common intention should be inferred from the whole conduct of all the persons concerned and not only from an individual act actually done. As the criminal act done is not to be assumed to be in furtherance of the common intention it follows that the common intention is not to be inferred exclusively from the criminal act done. The criminal act done will certainly be one of the factors to be taken into F consideration but should not be taken to be the sole factor. Besides proving that a certain criminal act was done, the prosecution has to prove the existence of common intention and that the criminal act was done in furtherance of it, these two are independent facts and one is not to be assumed or inferred exclusively from the other. …

G

Therefore all the facts and surrounding circumstances must be taken into consideration.

(3) Participation in the criminal act

H 61 Section 34 requires the criminal act to be 'done by several persons'. There must be physical presence at the site of the actual commission of the offence in question coupled with actual participation, whether active or passive: *Public Prosecutor v Gerardine Andrew* [1998] 3 SLR 736 and *Too Yin Sheong v Public Prosecutor* [1999] 1 SLR 682. Regarding passive participation, the comment of Lord Sumner in *Barendra Kumar Ghosh* at p 6 of the report that 'in crimes as in other things they also I serve who only stand and wait', albeit merely obiter, is noteworthy.

62 In *Om Prakash v State* AIR 1956 All 241, it was held that presence on the spot for the purpose of facilitating or promoting the offence is itself tantamount to actual participation in the criminal act. The court cited as an example a person who is present at the spot as an eyewitness to the offence, this was to be contrasted with a

person who is present as a confederate of the assailant. The former is not guilty because he is present merely to see the commission of the crime, whereas the latter is guilty because he is present for the purpose of seeing that the crime is committed. The following observations of Mookerjee J in *Emperor v Barendra Kumar Ghosh* AIR 1924 Cal 257 (FB) (D) were held relevant:

It is the expectation of aid, in case it is necessary to the completion of the crime and the belief that his associate is near and ready to render it, which encourage and embolden the chief perpetrator, and incite him to accomplish the act. By the countenance and assistance which the accomplice thus renders, he participates in the commission of the offence.

It is therefore sufficient to hold a party as principal, if it is made to appear that he acted with another in pursuance of a common design; that he operated at one and the same time for fulfillment of the same pre-concerted end, and was so situated as to be able to furnish aid to his associates with a view to insure success in the accomplishment of the common enterprise.

In this context, the words 'criminal act' in s 34 are to be taken in the broadest possible sense, as s 33 states that an act includes a series of acts. Beg J in *Om Prakash* stated that the words would cover any word, gesture, deed or conduct of any kind on the part of a person, whether active or passive, which tends to support the common design.

[106] In *Zailani bin Ahmad v Public Prosecutor [2004] SGCA 56* [2005] 1 SLR 356 (CA), Yong Pung How CJ said:

In this context, reference should be made to *Ratanlal and Dhirajlal's The Indian Penal Code*, (29th Ed, 2002) ('*Ratanlal*') at p 194, where the learned authors state that:

Before any accused can be convicted of an offence read with this section [s 34 Indian Penal Code], the Court *must arrive at a finding as to which of the accused took what part, if any, in furtherance of the common intention. A conviction without such a finding is illegal.* (Emphasis added.)

Section 34 of the Indian Penal Code is in pari materia with s 34 of our Penal Code (Cap 224, 1985 Rev Ed) ('PC'). The authors of *Rantanlal*, in this regard, seemed to have relied on the case of *Fazoo Khan & Ors v Jatoo Khan & Anor* AIR 1931 Cal 643 ('Fazoo Khan') in support of their submission.

31 The views expressed in *Ratanlal* came up for discussion before the Malaysian Court of Appeal in *Chin Hon & 2 Ors v Public Prosecutor* [1948] MLJ 193 and the court took issue with the phrase 'which of the accused', appearing in the headnote of *Fazoo Khan*, holding that there was nothing in *Fazoo Khan* which required a court to arrive at a finding as to the part played by each individual accused. The court then referred to the Privy Council decision in *Mahbub Shah v Emperor* AIR 1945 PC 118 for the correct position in law, and said at pp 193–194:

The first of the two comments (the views in *Ratanlal*) quoted above was based on the headnote to *Fazoo Khan & Ors v Jatoo Khan & Anor*, which reads as follows:

Penal Code s 34 Participation in action to commit offence with common intention is essential element and the court must arrive at finding as to part played by each individual accused in furtherance of common intention … a conviction without such finding is illegal.

There is nothing in the judgment in that case to support that part of the headnote which requires a court to arrive at a finding as to the part played by each individual accused. The correct position is made clear by the decision of the Privy Council in *Mahbub Shah v Emperor*. The relevant portion of the headnote to the report of that appeal reads as follows:

Common intention within the meaning of s 34 implies a pre-arranged plan. To convict the accused of an offence applying s 34 it should be proved that the criminal act was done in concert pursuant to the pre-arranged plan.

And in the judgment the following observations appear:

To invoke the aid of s 34 successfully, it must be shown that the criminal act complained against was done by one of the accused persons in furtherance of the common intention of all: if this is shown, then liability for the crime may be imposed on any one of the persons in the same manner as if the act were done by him alone. (Emphasis added.)

[107] In *Lee Kwai Heong & Anor v Public Prosecutor* [2006] 2 MLJ 528, the Court of Appeal said:

The crucial ingredient to prove common intention is the existence of pre-concert or pre-planning which may develop on the spot or during the course of commission of the offence. The crucial test is that such plan must precede the act constituting an offence. In *Sabarudin bin Non & Ors v Public Prosecutor* [2005] 4 MLJ 37, this court dealt with proof of common intention succinctly at p 50:

To deal with the criminal liability of the second and third accused, it is necessary first to quote from two recent authorities to remind ourselves of the law governing s 34. In *Suresh v State of Uttar Pradesh* AIR 2001 SC 1344, Sethi J speaking for himself and Agrawal J said:

Section 34 of the Indian Penal Code recognises the principle of vicarious liability in the criminal jurisprudence. It makes a person liable for action of an offence not committed by him but by another person with whom he shared the common intention. It is a rule of evidence and does not create a substantive offence. The section gives statutory recognition to the common sense principle that if more than two persons intentionally do a thing jointly, it is just the same as if each of them had done it individually. There is no gain saying that a common intention pre-supposes prior concert, which requires a pre-arranged plan of the accused participating in an offence. *Such a pre-concert or pre-planning may develop on the spot or during the course of commission of the offence but the crucial test is that such plan must precede the act constituting an offence. Common intention can be formed previously or in the course of occurrence and on a spur of moment. The existence of a common intention is a question of fact in each case to be proved mainly as a matter of inference from the circumstances of the case*. (Emphasis added.)

In *Hari Ram v State of Uttar Pradesh* [2004] 3 LRI 523 (SC) which was decided by the Indian Supreme Court in August 2004, Arijit Pasayat J said:

> Under the provisions of s 34, the essence of the liability is to be found in the existence of a common intention animating the accused leading to the doing of a criminal act in furtherance of such intention. As a result of the application of principles enunciated in s 34, when an accused is convicted under s 302 read with s 34, in law it means that the accused is liable for the act which caused death of the deceased in the same manner as if it was done by him alone. The provision is intended to meet a case in which it may be difficult to distinguish between acts of individual members of a party who act in furtherance of the common intention of all or to prove exactly what part was taken by each of them. As was observed in *Ch Pulla Reddy & Ors v State of Andhra Pradesh* AIR 1993 SC 1899, s 34 is applicable even if no injury has been caused by the particular accused himself. For applying s 34, it is not necessary to show some overt act on the part of the accused.

[108] Visu Sinnadurai J in *Public Prosecutor v Muhamad Nasir bin Shaharuddin & Anor* [1994] 2 MLJ 576 at p 588:

> One of the consequences of a joint charge is that the evidence adduced by the prosecution may not be sufficient to establish the guilt of each and every one of the accused. In cases of common intention, the prosecution need only establish that one of the accused committed the act and that the others participated in it in furtherance of a common intention. In cases of joint charges, however, the prosecution must adduce sufficient evidence to establish the guilt of each of the accused as a separate exercise.

THE LAW ON THE DEFENCE OF THE ACCUSED

[109] The law on the defence of the appellants does not require corroboration. However, it has been held in *Shanmugam v Public Prosecutor* [1963] MLJ 125 that:

> I wish to make it clear, however, that in law the defence of an accused person does not require corroboration though it goes without saying that corroboration would certainly help.

[110] In *Goh Ah Yew v Public Prosecutor* [1949] MLJ 150 it was held that:

> There is no duty on the defence to call any evidence for all it has to do is to raise a reasonable doubt.

[111] Similarly in *Regina v Gallagher* [1974] 1 WLR 1204, *Public Prosecutor v Lim Kuan Hock* [1967] 2 MLJ 114 at p 115 and *Tay Choo Wah v Public Prosecutor* [1976] 2 MLJ 95 at p 100, it was held that:

No adverse inference can be drawn against an accused person by reason of his failure to call any witness. However, the failure to call any particular witness is a matter which the court may take into account in assessing the weight of evidence (without drawing any adverse inference) especially so when the potential witnesses were persons in respect of whom the prosecution had probably no means of knowing that they might have any relevant evidence to give until the accused himself came to give evidence.

DUTY OF THE COURT AT THE END OF THE DEFENCE CASE

[112] Sections 181 and 182A of the Criminal Procedure Code states:

181 Defence

(1) When the accused is called upon to enter on his defence he or his advocate may then open his case, stating the facts or law on which he intends to rely and making such comments as he thinks necessary on the evidence for the prosecution. He may then examine his witnesses (if any) and after their cross-examination and re-examination (if any) may sum up his case:

Provided always that if any accused person elects to be called as a witness, his evidence shall be taken before that of other witnesses for the defence: Provided also that any accused person who elects to be called as a witness may be cross-examined on behalf of any other accused person.

(2) The accused shall be allowed to examine any witness not previously named by him under the provisions of this Code if such witness is in attendance.

182A Procedure at the conclusion of the trial.

(1) At the conclusion of the trial, the Court shall consider all the evidence adduced before it and shall decide whether the prosecution has proved its case beyond reasonable doubt.

(2) If the Court finds that the prosecution has proved its case beyond reasonable doubts, the Court shall find the accused guilty and he may be convicted thereon.

(3) If the Court finds that the prosecution has not proved its case beyond reasonable doubt, the Court shall record and order of acquittal.

[113] The duty of the court at the end of the defence case was stated in *Kenneth Fook Mun Lee v Public Prosecutor* [2007] 2 MLJ 130; [2006] 4 CLJ 359 that:

… *Section 180 of the Criminal Procedure Code ('CPC')* provides that when the case for the prosecution is concluded, the court shall consider whether the prosecution has made out a prima facie case against the accused and if the court finds a prima facie case has been made out against the accused on the offence charged the court shall call upon the accused to enter on his defence. We do not think it is the duty of

the court at that stage to anticipate or speculate any defence that has not been raised and give due consideration to it. More so, a defence categorically denied to be the line of defence to be taken as in this case. Consequently *s 181 of the CPC* provides that when the accused is called upon to enter on his defence, he or his advocate may then open his case, stating the facts or law on which it intends to rely and making such comment as he thinks necessary on the evidence for the prosecution. He may then examine his witnesses and consequently sum up his case. *Section 182A of the CPC* provides that at the conclusion of the trial, the court shall consider all the evidence adduced before it and shall decide whether the prosecution has proved its case beyond reasonable doubt.

[114] In *Abdullah bin Jacomah v Public Prosecutor* [2002] 6 MLJ 324, the court held that:

… The law governing a proper appraisal of a defence that has been advanced is well settled. It requires a consideration of all the evidence that have been adduced in support of the defence (see *Chang Lee Swee v Public Prosecutor* [1985] 1 MLJ 75; *Mohamed Shariff v Public Prosecutor* [1964] MLJ 64). A court must consider carefully whether a defence that has been put forward is capable of raising a reasonable doubt in the prosecution case …

[115] In *Public Prosecutor v Neoh Wan Kee* [1985] 1 MLJ 368, Edgar Joseph Jr J held that:

It is fundamental that it is not for the defence to prove anything and that all that is required of it is to tender an explanation that is reasonable and probable and which casts a doubt either as to the truth of the prosecution case or as to the guilt of the accused.

[116] In *Haryadi bin Dadeh v Public Proseecutor* [2000] 4 MLJ 71 it was held that:

The learned trial judge acknowledged that although the appellant's defence was one of bare denial, on the authority of *Mat v Public Prosecutor* [1963] MLJ 263 he was nevertheless legally bound to consider if the defence put forward was capable of raising a reasonable doubt on the prosecution's case.

[117] Mohamed Azmi SCJ held in *Mohamad Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169 at p 171:

We are of the view that whenever a criminal case is decided on the basis of the truth of the prosecution's case as against the falsity of the defence story, a trial judge must in accordance with the principle laid down in *Mat v Public Prosecutor* [1963] MLJ 263 go one step further before convicting the accused by giving due consideration as to why the defence story, though could not be believed, did not raise a reasonable doubt in the prosecution case. Thus, even though a judge does not accept or believe

the accused's explanation, the accused must not be convicted until the court is satisfied for sufficient reason that such explanation does not cast a reasonable doubt in the prosecution case.

DUTY OF THE APPELLANTS AT THE DEFENCE CASE

[118] It is settled law that the duty of accused person at the defence's case is merely to cast a reasonable doubt on the prosecution's case. In *Public Prosecutor v Saimin & Ors* [1971] 2 MLJ 16 it was held that:

> … A reasonable doubt must be a doubt arising from the evidence or want of evidence and cannot be an imaginary doubt or conjecture unrelated to evidence.
>
> To warrant an acquittal, the defence put forward must be a story that leaves the court in a genuine and reasonable doubt as to whether the explanation put forward by the accused is true — *Public Prosecutor v Sam Kim Kai* [1950] MLJ 265.
>
> And that a reasonable doubt is not created on a story, which is incredible or romancing character, or that the abstention arises from mere motives of delicacy or when counsel indicates that he is merely abstaining for convenience, eg, to save time — *Ayoromi Helen v Public Prosecutor* [2005] 1 MLJ 699; [2005] 1 CLJ 1.

NON-RECOVERY OF THE MURDER WEAPON, THE WOODEN BASEBALL

[119] The evidences clearly showed the cause of death was due to a blunt object possibly the wooden baseball bat which was never recovered. However, this does not mean that without the murder weapon, an otherwise solid case will result in acquittal. This would mean that all criminals will get away scot free due to the non-production of the murder weapon. The usage of the wooden baseball bat was never disputed by both the appellants PW9 and PW14. They themselves admitted the presence of the wooden baseball bat. The evidence is overwhelming that the said wooden baseball bat was the cause of death of the deceased. The evidence are as follows:

(a) The investigating officer, PW13 tried to look for the wooden baseball bat in the river at 4th KM, Jalan Kampong Gajah, Kahang Timor, Kluang, but failed.

(b) PW9 saw the second appellant hitting the deceased with the wooden baseball bat.

(c) The second appellant admitted that he used the wooden baseball bat to hit the deceased.

(d) The first appellant admitted that he saw the first appellant using the wooden baseball bat to hit the deceased.

(e) PW14, the pathologist in his evidence stated that the four injuries on the deceased's head suggested that there were at least four impacts on the

deceased's body. He suggested that it was not caused simultaneously. The wooden baseball bat can cause the tramline bruises head injuries.

(f) That the tramline bruises on right middle back was due to the wooden baseball bat.

(g) That a wooden baseball bat 2 feet long can cause the blunt force on the brain.

[120] In *Sunny Ang v Public Prosecutor* [1966] 2 MLJ 195 Tan Ah Tah AGCJ in the Federal Court held that:

> Although Jenny's body has never been found, there is overwhelming evidence on the record that the appellant murdered her. In our judgment no miscarriage of justice has occurred in this case.
>
> The evidence relied upon by the prosecution was wholly circumstantial. For that reason it is relevant to set out the more important facts and circumstances which the jury were in a position to find, if they decided to do so, from the evidence. These facts and circumstances were as follows:
>
> (a) The appellant had been made a bankrupt in October 1962 and was still a bankrupt on the 27 August 1963, being the day on which the offence was alleged to have been committed. He was in need of money and that could be a motive for the crime.
>
> (b) On the 27 August 1963 Jenny was insured against accidents with several insurance companies, the total sum being $450,000.
>
> (c) One of the insurance policies under which Jenny was insured for the sum of $150,000 had lapsed on the 26 August 1963 but was renewed by the appellant on the morning of the 27 August 1963 for another five days. The appellant, however, did not renew or extend his own insurance policy which had been taken out at the same time.
>
> (d) Another one of these insurance policies, which was for the sum of $100,000 was due to expire on the 28 August 1963.
>
> (e) The beneficiary named in some of the policies was the appellants mother. In the case of the other policies the benefit was to go to Jenny's estate.
>
> (f) Jenny, who was 22 years of age and was a bar waitress earning $90 per month and about $10 in tips per day when she worked, made a will on the 7 August 1963 in which the appellant's mother was named as the sole beneficiary. The appellant accompanied Jenny to the solicitor's office when instructions for the preparation of the will were given to the solicitor.
>
> (g) Jenny had only a little experience of what is called scuba diving and might fairly be described as a novice scuba diver. This was known to the appellant, although he claimed that she had made good progress under his tuition.
>
> (h) On the 27 August 1963 the appellant allowed Jenny to go down into the waters near Pulau Dua alone. According to an expert witness, it was not safe for a novice to scuba dive alone.

(i) The waters near Pulau Dua were dangerous and hazardous. The appellant had dived in these waters on previous occasions and was in a position to know this.

(j) The appellant did not go down into the water himself even after Jenny had failed to come to the surface.

(k) Jenny did not wear gloves when she went down into the water. This could be inferred, if the jury decided to do so, from the fact that the two pairs of gloves which had been brought by the appellant on that occasion were still in his

(l) One of the flippers worn by Jenny that day was found on the 3 September 1963 at a depth of about 45 feet not very far from the place where she had gone into the water. The heel strap was severed and on examination it was found that the strap had been cut in two places by a knife or sharp instrument. There was no direct evidence to show who had cut the strap but it was open to the jury, if they decided to do so, to find that it was the appellant who had cut it. It was stated by an expert witness that if a diver suddenly loses one of his flippers whilst scuba diving, his equilibrium would be upset, his mobility impaired and it might well lead to panic in the case of an inexperienced diver.

(m) The conduct of the appellant after the disappearance of Jenny was described by Yusof and other witnesses. It was open to the jury to find that there was a lack of urgency in the conduct of the appellant at the relevant time.

(n) Less than 24 hours after the disappearance of Jenny, the appellant made formal claims on the three insurance companies which had issued policies covering her against accidents.

[121] In *Public Prosecutor v Ho Jin Lock and another trial* [1999] 3 MLJ 625 Jeffrey Tan J held at p 634 that:

> And there could be no doubt that both Ramesh and Edmund were shot, just as the prosecution witnesses said. The recovery of slugs from Edmund's brain and from Ramesh's body established, most undoubtedly, that both Edmund and Ramesh were shot by a firearm at the material time in question. And the testimony of the pathologist established just as undoubtedly that Ramesh was mortally struck down, by a bullet from a firearm.
>
> Admittedly, it was not produced the firearm in question. Yet, that there was a serviceable firearm and discharge of that firearm could be denied, for there is incontestable evidence: (i) slugs and gunshot wounds; and (ii) the slugs in Edmund and Ramesh — of the discharge of a serviceable firearm. That is the only deduction that could be drawn from the incontestable evidence that could not be fabricated — the slugs, gunshot wounds and blood stains at the lounge. That there was a discharge of a serviceable firearm at the material time is the only conclusion that could be reached. The recovery of a live cartridge at the scene merely augmented what is already in surfeit on the discharge of a firearm. For, with production of the slugs and live cartridge and with the testimony, inter alia, of the doctors that those slugs were recovered from Edmund's brain and from Ramesh's body — as said, evidence that could not have been fabricated — it would defy all logic and good sense to doubt the truth of the truth of the firearm and discharge of that firearm at about 2.30am on 5

August 1992, just because the actual firearm was not produced. Given the undoubted truth of the slugs, cartridge and wounds sustained by Edmund and Ramesh, the failure to produce the firearm in question could not cast any reasonable doubt on the truth of a firearm and discharge of that firearm at 'Hot Lips' Lounge. There was, unquestionably, a serviceable firearm and discharge of that firearm at the material time. Otherwise, Edmund and/or Ramesh could not have sustained their gunshot wounds.

WAS PW9 AN ACCOMPLICE?

[122] The law on accomplice is clear.

[123] Section 133 of the Evidence Act 1950 states that:

Section 133 Accomplice

An accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice.

[124] The meaning of the word 'accomplice' was explained:

(a) per Mohamed Zahir J in *Public Prosecutor v Abdul Azizsou & Ors* [1978] 2 MLJ 165 (HC) at p 166:

The learned deputy public prosecutor argued that PW3 was not an accomplice and he referred to *Rattan Singh v Public Prosecutor* [1971] 1 MLJ 162 which is a corruption case in which the learned judge quoted *R v Mullins* (1848) 3 Cox CC 526 where Maule J said at p 530 as follows:

Barrett and Baldwinson, on the other hand, were really chartists, concurring fully in the criminal designs of the rest for a certain time, until getting alarmed, or from some other cause, they turned against their former associates, and gave information against them. These persons may be truly called accomplices.

The learned deputy public prosecutor also quoted *Lian Teck Chew v Regina* [1955] MLJ 28 where one Mr Waters, an acting Deputy Superintendent of the Harbour Board Police, on three occasions carried chandu from the Harbour Board area and on each occasion was subsequently given a sum of money.

The learned deputy public prosecutor argued that an accomplice is one who participated in the offence and he submitted that PW3 did not participate in the offence unlike Barrett and Baldwinson in *R v Mullins* and that he was more like Mr Waters in *Lian Teck Chew*.

With respect, I do not agree with him. I agree with the learned President that PW3 is an accomplice. It was he who wrote down the number of five parcels on which duty had not been paid and which was the subject matter of the charge. It was he

who tampered with exh CD6 (P4) enabling the crime to be perpetrated. PW3 could be charged jointly with the three respondents. In the same case *R v Mullins* (above), Maule J stated:

An accomplice is a person who has concurred in the commission of an offence.

In *Lian Teck Chew*'s case it was only the allegation of the appellant, the accused in that case, that Mr Waters carried the chandu. It was a mere allegation and the court obviously did not believe the accused. But if Mr Waters did in fact carry the opium as alleged and it was so proved, then I am of the opinion that he was also an accomplice.

(b) per Buhagiar J in *Re Soo Leot* [1956] MLJ 54 at pp 55–56 (HC):

The question 'who is an accomplice' has been fully dealt with by the House of Lords in *Davies v Director of Public Prosecutions* [1954] 1 All ER 507. The principles laid down in this case may be briefly stated as follows:

The following persons, if called as witnesses for the prosecution, have been treated as falling within the category of accomplice for the purpose of the rule that a judge ought to warn juries about the evidence of an accomplice:

(i) On any view, persons who are participes criminis in respect of the actual crime charged, whether as principals or accessories before or after the fact (in felonies) or persons committing, procuring or aiding and abetting (in the case of misdemeanours). This is the natural and primary meaning of the term 'accomplice'. But in two cases, persons falling strictly outside the ambit of this category have, in particular decisions, been held to be accomplices for the purposes of the rule, viz;

(ii) receivers have been held to be accomplices of the thieves from whom they receive goods on a trial of the latter for larceny;

(iii) when X has been charged with a specific offence on a particular occasion, and evidence is admissible, and has been admitted, of his having committed crimes of this identical type on other occasions, as proving system and intent and negativing accident; in such cases the court has held that in relation to such other similar offences, if evidence of them were given by parties to them, the evidence of such other parties should not be left to the jury without a warning that it is dangerous to accept it without corroboration.

(c) per KC Vohrah J (as he then was) in *Public Prosecutor v Mohd Jamil bin Yahya & Anor* [1993] 3 MLJ 702 (HC) at p 711 which post these questions:

But how does one determine whether a person is an accomplice?

As pointed out in *Sarkar*, Vol 2 at p 1280:

> The point for determination appears to be whether the witness entered into the conspiracy with the sole object of detecting and betraying it or whether he is a person who concurred fully in the criminal design of his co-conspirators for a time and joined in the execution of these till out of fear or for some other reason he withdrew from the conspiracy and gave information to the authorities. If he extends no aid to the prosecution until after the offence has been committed, he would be an accomplice. If he originally joined the conspiracy with the sole object of taking part in the crime, he cannot change his position to that of an informer by subsequently giving information of the crime (see *Karim v R* 9L 550; *Pulin v R* 16 CWN 1105, 1148; *R v Chaturbhuj* 38 C 96; *Mohan Lal v R* AIR 1947 N 109.

[125] Corroborative evidence in this case can be seen in the evidence of PW5 and PW14. In the case of *Brabakaran v Public Prosecutor* [1966] 1 MLJ 64, Ong Hock Thye FJ held that:

> Corroborative evidence is not necessarily restricted to the oral evidence of an independent witness. Corroboration can equally well be afforded by established facts and the logic of established facts sometimes speaks more eloquently than words.

[126] Section 3 of the Evidence Act 1950 states that:

> 'Fact' means and includes —
>
> (a) any thing, state of things or relation of things capable of being perceived by the senses;
>
> (b) any mental condition of which any person is conscious. …

[127] In *Yap Ee Kong & Anor v Public Prosecutor* [1981] 1 MLJ 144 where Raja Azlan Shah CJ (Malaya) (as His Highness then was) said at p 146 that:

> In such a situation the principles enunciated by Lord Morris of Barth-y-Gest in *Director of Public Prosecutions v Hester* [1973] AC 296 at p 315 should be applied:
>
> The essence of corroborative evidence is that one creditworthy witness confirms what another creditworthy witness has said …. The purpose of corroboration is not to give validity or credence to evidence which is deficient or suspect or incredible but only to confirm and support that which as evidence is sufficient and satisfactory and credible: and corroborative evidence will only fill its role if it itself is completely credible evidence.

[128] In *Thavanathan a/l Balasubramaniam v Public Prosecutor* [1997] 2 MLJ 401; [1997] 3 CLJ 150 (SC), it was held that at pp 173–174:

> In the celebrated case of *The King v Baskerville* [1916] 2 KB 658 Lord Reading CJ expressed the requirements of corroborative evidence (at p 667) as:

A … evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it. The test applicable to determine the nature and extent of the corroboration it thus the same whether the case falls within the rule of practice at common law or within that class of offences for which corroboration is required by statute. … The nature of the corroboration will necessarily vary according to the particular circumstances of the offence charged. It would be in high degree dangerous to attempt to formulate the kind of evidence which would be regarded as corroboration, except to say that corroborative evidence is evidence which shows or tends to show that the story of the accomplice that the accused committed the crime is true, not merely that the crime has been committed, but that it was committed by the accused.

…

In *Director of Public Prosecutions v Kilbourne* [1973] AC 729 Lord Hailsham said (at p 741) that:

In my opinion, evidence which is: (a) admissible; and (b) relevant to the evidence requiring corroboration, and, if believe, confirming it in the required particulars, is capable of being corroboration of that evidence, and, when believed, is in fact such corroboration.

At p 750 in the same case above, Lord Reid held that:

We must be astute to see that the apparently corroborative statement is truly independent of the doubted statement. If there is any real chance that there has been collusion between the makers of the two statements, we should not accept them as corroborative.

The corroborating evidence must confirm the evidence requiring corroborating evidence must confirm the evidence requiring corroboration in at least one particular which is directly relevant to the issues in the case in that it tends to suggest not only that the offence charged has been committed but also that it has been committed by the accused. Such corroborating evidence may be direct or circumstantial.

Thus, to be capable in law of constituting corroboration, the evidence must:

(a) in itself be admissible;

(b) come from a source independent of the evidence requiring to be corroborated; and

(c) be such as to tend to show, by confirmation of some material particular, not only that the offence charged was committed, but also that it was committed by the accused.

[129] In *Attan bin Abdul Gani v Public Prosecutor* [1970] 2 MLJ 143, Sharma J held at p 146 that:

The law as to corroboration as enunciated by the various authorities may be summarised thus: A

It would be impossible, indeed it would be dangerous, to formulate the kind of evidence which should, or would, be regarded as corroboration. Its nature and extent must necessarily vary with the circumstances of each case and also according to the particular circumstances of the offence charged. But to this extent the rules are clear: B

(1) It is not necessary that there should be independent confirmation of every material circumstance in the sense that the independent evidence in the case, apart from the testimony of the complainant or the accomplice, should in itself be sufficient to sustain conviction. All that is required is that there must be some additional evidence rendering it probable that the story of the accomplice (or complainant) is true and that it is reasonably safe to act upon it. C

(2) The independent evidence must not only make it safe to believe that the crime was committed but must in some way reasonably connect or tend to connect the accused with it by confirming in some material particular the testimony of the accomplice or complainant that the accused committed the crime. D

(3) The corroboration must come from independent sources and thus ordinarily the testimony of one accomplice would not be sufficient to corroborate that of another. E

(4) The corroboration need not be direct evidence that the accused committed the crime. It is sufficient if it is merely circumstantial evidence of his connection with the crime.

(5) Corroboration must be in material particulars but it is not necessary that the whole prosecution story or all material particulars should be corroborated. F

(6) Corroborative evidence required for accepting the testimony of an accomplice need not by itself conclusively establish the guilt of the accused. It is sufficient if it is a piece of circumstantial evidence which tends to connect the accused with the crime with which he is charged.

(7) Though a trap witness is not an approver, he is certainly an interested witness in the sense that he is interested to see that the trap laid by him succeeded. He could at least be equated with a partisan witness and it would not be admissible to rely upon his evidence without corroboration. His evidence is not a tainted one; it would only make a difference in the degree of corroboration required rather than the necessity for it. G H

(8) Corroboration need not be by direct evidence. It may be by circumstantial evidence in which case the rule relating to proof from circumstantial evidence would apply and the circumstance must be consistent with the innocence of the accused against whom the circumstance is offered as evidence.

(9) There must be corroboration in one or more material particulars but that does not mean in every particular or detail. Corroboration, as the grammatical meaning of the word itself implies, means only support, or in other words, an assurance of truth which is lent to the evidence of the accomplice or the complainant by other evidence. It does not mean that the whole evidence given I

A by the accomplice (or complainant) must be repeated wholly or in parts by witnesses other than the accomplice (or the complainant).

(10) The minimum corroboration which the law ordinarily requires of the evidence of an accomplice is evidence of at least one material fact pointing to the guilt of the accused person. The weight of such corroborative evidence which is necessary depends on the particular facts and circumstances of the case.

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[130] However, in this case, the learned judicial commissioner had concluded that PW9 is not an accomplice. In *Harcharan Singh & Anor v Public Prosecutor* [2005] 1 MLJ 593; [2005] 1 CLJ 11, the Court of Appeal held:

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> Before us it was strenuously argued by learned counsel that PW9 is an accomplice. There is no evidence to suggest that PW9 had ever participated in the first and second accused's act of pulling the rope around the deceased's neck. However, he was a witness to the final moments of their attack on the deceased and he assisted them in disposing off the body and did not inform anyone of whatever he had seen and the assistance that he had rendered. He is therefore an accessory after the fact. The question that requires to be determined is whether such a witness is an accomplice. In *Davies v Director of Public Prosecutions* [1954] 1 All ER 507 the House of Lords held that persons who are particeps criminis in respect of the actual crime charged, whether as principals or accessories before or after the fact in felonies or persons committing, procuring or aiding and abetting in the case of misdemeanours are accomplices. In England, s 1 of the Criminal Law Act 1967 has abolished the distinction between felonies and misdemeanours. There is no such distinction in this country. However, it has been accepted that an accomplice is a person who is particeps criminis in respect of the actual crime charged (see *Re Soo Leot* [1956] MLJ 54, *Kuan Ted Fatt v Public Prosecutor* [1985] 1 MLJ 211; [1985] 1 CLJ 150; [1985] CLJ (Rep) 174, *(1) Namasiyiam (2) Rajindran (3) Goh Chin Peng, and (4) Ng Ah Kiat v Public Prosecutor* [1987] 2 MLJ 336; [1987] 1 CLJ 540; [1987] CLJ (Rep) 241).

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[131] In *Kuan Ted Fatt v Public Prosecutor* [1985] 1 MLJ 211; [1985] CLJ (Rep) 174, the Federal Court held that:

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> For the public prosecutor, the learned senior federal counsel had submitted that there was no evidence at the trial that PW14 Fam had taken part in the offence of murder. On the other hand PW14 was not aware that the appellant was carrying a knife hidden at the back of his trousers pocket and that PW14 did not know that the appellant had indented to use a knife to kill the deceased. In other words, PW14 had no prior knowledge that the appellant had intended to commit the offence charged.
>
> In our judgment, and having regard to the principle enunciated in *Davies v Director Public Prosecutions* [1954] AC 378 learned counsel for the appellant failed to establish that PW14 Fam participated in the offence of murder and on the evidence produced before the trial court, the learned judge was right in not regarding PW14 as an accomplice. In his submission that PW14 could be so regarded learned counsel

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for the appellant seemed to base his contention on two grounds, viz:

(a) that PW14 failed to report to the police about the offence charged; and

(b) that he left for Beliong, a coastal town, the next day.

In our opinion, none of these grounds relied on by learned counsel is a valid one.

[132] Based on the authorities cited above, it is safe to say that even if PW9 is an accomplice, his evidence can be admitted on grounds that:

(a) he was at the scene of the crime, and even if he did not actively participate in assaulting the deceased, he assisted the appellants in facilitating the offence;

(b) he went with both the appellants to collect from the deceased the money meant for the appellants from the stolen television;

(c) he was promised by the appellants an unstated amount of money for helping them; and

(d) PW14, the pathologist in his evidence at P40, said that the post mortem report clearly stated that the cause of death is due to head injury due to blunt object which in this case was caused by the wooden baseball bat.

ARE THE APPELLANTS ENTITLED TO EXCEPTION 2 IN S 300 OF THE PENAL CODE?

[133] Exception 2 of s 300 of the Penal Code states that:

> Section 300 Murder
>
> Except in the cases hereinafter excepted, culpable homicide is murder —
>
> *Exception 2* — Culpable homicide is not murder if the offender, in the exercise in good faith of the right of private defence of person or property, exceeds the power given to him by law, and causes the death of the person against whom he is exercising such right of defence, without premeditation and without any intention of doing more harm than is necessary for the purpose of such defence.

[134] The learned judicial commissioner's reliance on two cases, *Wong Teck Choy v Public Prosecutor* [2005] 4 MLJ 693; [2005] 3 CLJ 431 and *Sainal Abidin bin Mading v Public Prosecutor* [1999] 4 MLJ 497; [1999] 4 CLJ 215 to conclude that the right of private defence is not open to the appellants is therefore correct.

[135] The Court of Appeal in *Wong Teck Choy* held at p 699 (MLJ) and pp 433–434 (CLJ) that:

> In this case only one critical question of fact before the learned judge for determination. That question was whether the deceased attacked the appellant with a knife. The learned judge answered the question in the negative. He further held that the appellant failed to raise a reasonable doubt on that issue. He arrived at his conclusion after a careful analysis of the facts and undertaking a probative measurement of all the evidence led before him (pp 438 and 439a).
>
> … the issue whether the plea of private defence was fairly open to the appellant in the circumstances of the case was a pure question of fact well within the province of the trial judge. He came to the conclusion that the facts and evidence before him did not admit of the defence. He also considered the second exception to s 300 of the Penal Code and concluded that it was also not available to the appellant. Those were correct directions based on the findings of fact that he made after an analysis of the material before him. It followed that there were settled principles herein that clearly ousted appellate intervention (at p 439b–c).

[136] In *Sainal Abidin*'s case, the Court of Appeal held that:

> *Defence case*
>
> The appellant elected to give evidence on oath.
>
> His defence can be broadly stated:
>
> (a) no intention to kill the deceased within s 300 of the Penal Code;
>
> (b) right of private defence within Exception 2 to s 300 of the Penal Code; and
>
> (c) sudden fight within Exception 4 to s 300 of the Penal Code.
>
> The learned judge in his written judgment went one step further to consider the defence of grave and sudden provocation (Exception 1 to s 300 of the Penal Code) even though no such defence was led and eventually held that there was no evidence to support such defence in view of the evidence of PW4, PW5 and even the evidence of the appellant himself negated such defence. We would therefore, leave this defence from our consideration though the learned judge was generous enough to consider it when he should not have considered it at all.

[137] In a nutshell, the reasoning given by the learned judicial commissioner can be summarised as follows:

(a) The second appellant had hit the deceased's head with the wooden baseball bat.

(b) The second appellant had admitted hitting the deceased's head in self defence but the post mortem showed otherwise.

(c) The first appellant had admitted seeing the second appellant hitting the deceased's head with the wooden baseball bat.

(d) PW9 admitted that the second appellant had swung and hit his hand with the wooden baseball bat.

(e) There was no evidence to show any anger or animosity during the journey to the scene of crime.

(f) There was no evidence to show PW9 provoked the deceased in order for the deceased to attack and assault him.

(g) PW9 saw the first appellant using the *parang* to assault the deceased.

(h) P40, the post mortem's report showed not one but 23 external injuries and bruises on the deceased's body.

(i) The deceased was in a squatting or bending position with both hands covering his head to avoid the raining assault by the appellants.

(j) The nature and site of injuries and bruises sustained by the deceased showed it was not inflicted in self defence.

(k) The second appellant admitted assaulting the deceased twice on his head as a self defence to restrain the assault by the deceased with the *parang*. However, PW14, the pathologist stated that there were four separate injuries suffered by the deceased and it was not done simultaneously. This means there were at least four minimum injuries suffered by the deceased on his head.

(l) PW9 said the second appellant struck the deceased's head with full force. This was clearly supported by PW14 who said only strong force can cause the head skull to crack causing massive hemorrhaging.

(m) The internal head injuries showed the massive pressure used to cause such injuries.

(n) The tramline bruises on the outer back upper one third of the right arm and the tramline bruises on the right middle back was suggested by PW14 as consistent with an object of sylindrical similar to wooden baseball bat as it touched the skin.

(o) The evidence of PW14 is consistent with the evidence of PW9 that the deceased was attacked continuously in the manner a punching bag.

(p) PW14 also said that the injuries on the head, neck, mouth and neck fracture was due to the wooden baseball bat.

(q) PW14 said that looking at the bruises, abrasions and lacerations, the cause of the injuries were more consistent with the evidence of PW9 than evidence that the deceased's injuries were caused when he fell on the road.

(r) The evidence of PW9 was intact.

(s) PW9 said the appellants sought his assistance as the deceased was bigger build than they were.

[138] Looking at the injuries sustained by the deceased which were inflicted not once but numerous times using full force, it cannot be said that both the appellants were acting in self defence. They had clearly gone beyond what was permissible even if they were made in self defence. In *Lee Thian Beng v Public Prosecutor* [1972] 1 MLJ 248, Ong Hock Sim FJ held that:

> In the second place, it is clearly the law, with regard to the use of force in self defence, that there must be no alternative to its recourse. As Lord Morris of Borth-y-Gest said recently in *Palmer v The Queen* [1971] 2 WLR 831 at p 839:
>
> An issue of self defence may of course arise in a range and variety of cases and circumstances where no death has resulted. The tests as to its rejection or its validity will be just the same as in a case where death has resulted. In its simplest form the question that arises is the question: was the defendant acting in necessary self defence?
>
> At p 843, His Lordship went on:
>
> In Their Lordships' view the defence of self defence is one which can be and will be readily understood by any jury. It is a straightforward conception. It involves no abstruse legal thought. It requires no set words by way of explanation. No formula need be employed in reference to it. Only common sense is needed for its understanding. It is both good law and good sense that a man who is attacked may defend himself.
>
> It is both good law and good sense that he may do, but may only do, what is reasonably necessary. But everything will depend upon the particular facts and circumstances. Of these a jury can decide. *It may in some cases be only sensible and clearly possible to take some simple avoiding action*. Some attacks may be serious and dangerous. Others may not be. If there is some relatively minor attack it would not be common sense to permit some action of retaliation which was wholly out of proportion to the necessities of the situation. If an attack is serious so that it puts someone in immediate peril then immediate defensive action may be necessary. If the moment is one of crisis for someone in imminent danger he may have to avert the danger by some instant reaction. If the attack is all over and no sort of peril remains then the employment of force may be by way of revenge or punishment or by way of paying off an old score or may be pure aggression. There may no longer be any link with a necessity of defence.
>
> Of all these matters the good sense of a jury will be the arbiter. There are no prescribed words which must be employed in or adopted in a summing up. All that is needed is a clear exposition, in relation to the particular facts of the case, of the conception of necessary self defence. If there has been no attack then clearly there will have been no need for defence. If there has been attack so that defence is reasonably necessary it will be recognised that a person defending himself cannot weigh to a nicety the exact measure of his necessary defensive action. If a jury thought that in a moment of unexpected anguish a person attacked had only done what he honestly and instinctively thought was necessary that would be most potent evidence that only reasonable defensive action had been taken.
>
> A jury will be told that the defence of self defence, where the evidence makes its raising possible, will only fail if the prosecution show beyond doubt that what the accused did was not by way of self defence.

> But Their Lordships consider, in agreement with the approach in the *De-Freitas* case [1960] 2 WIR 523, that if the prosecution have shown that what was done was not done in self-defence then that issue is eliminated from the case.

WHEN TWO SETS OF EVIDENCE ARE AVAILABLE

[139] Based on the prosecution's case and the appellant's case which had been set out earlier, the learned judicial commissioner had clearly not accepted the evidence of the appellants.

[140] The appellants relied heavily on the Court of Appeal case of *Mohd Nor Riza Mat Tahar v Public Prosecutor* [2008] MLJU 880; [2009] 3 CLJ 350.

[141] However this case was overturned by the Federal Court cited as *Public Prosecutor v Mohd Nor Riza bin Mat Tahar* [2009] 4 CLJ 691. It was held at p 698 that:

> We found that SP4's evidence was in fact corroborated by the evidence of another prison warden, Rahim bin Yahadi ('SP5') who happened to be in the common rest room of the bachelors prison barrack at the material time. Upon hearing the commotion, SP5 went out of the rest room and saw SP4 holding the respondent from behind. He also saw the respondent holding a knife in his hand. SP5 then immediately ran to get help from Sgt Yunus ('SP7') who was at a stall just outside the Seremban prison fencing. Both of them then went to the scene whereupon SP7 saw Sgt Zulkifli ('SP6') holding the respondent who was struggling. When SP7 took custody of the respondent from SP6, the respondent was still struggling and shouting that he was satisfied because he had stabbed the deceased several times. We found no reason to doubt the evidence of SP4, SP6 and SP7.

[142] In *Lee Thian Beng v Public Prosecutor* [1972] 1 MLJ 248 at p 251 it was held:

> The judge was perfectly satisfied that the deceased's fatal injuries were caused by the appellant and counsel arguing this appeal has been unable to suggest that any other person was responsible for it. According to the pathologist, Dr Chan Choe Fatt, the deceased's left upper eyelid was almost completely torn off by a ragged wound and the eyeball was protruding from its orbit. The cause of death was extensive brain injury, resulting from fracture of the skull. The injury to the brain was the result of the injury extending from the left eye and the fracture cavity in the skull measured 2.5cm in diameter; the depth of internal penetration was at least 3cm from the eyelid. The external and internal injury above described was likely to have been caused by a single blow.

CONCLUSION

[143] After hearing all parties we are unanimous in dismissing this appeal. Our view is as follows.

[144] That PW9 is an accomplice. However his evidence may be accepted although uncorroborated (s 133 of the Evidence Act 1950).

[145] There was clearly common intention on both the first and second appellants' part to commit the offence.

[146] We are satisfied that the appellants intended to cause bodily injury on the victim and that such bodily injury inflicted was sufficient in the ordinary course of nature to cause death.

[147] We agree with the findings of the learned judicial commissioner that both the appellants had failed to establish the defence of self defence of grave and sudden provocation, and thus he was correct in concluding that the prosecution had proven its case beyond reasonable doubt.

[148] My learned brother Hasan Lah JCA has seen this draft and agrees with it. Mohd Hishamudin Yunus JCA agrees with the decision but is writing a separate judgment.

[149] On the above grounds we dismissed this appeal and affirmed the decision of the High Court on conviction and sentence.

Mohd Hishamudin JCA:

(*With the permission of the Rt Hon President of the Court of Appeal pursuant to the proviso to sub-s (2) of s 62 of the Courts of Judicature Act 1964*)

[150] This is an appeal against the decision of the learned judicial commissioner of the High Court of Muar ('the learned trial judge') who, on 16 March 2008, had convicted the appellants (the two accused persons) of the charge of murder, a capital offence, under s 302 of the Penal Code, and had sentenced them to death under the same section.

[151] The charge relates to the murder of one Azley bin Abu Bakar, 27 years of age, at Taman Desa Harmoni, Kluang, between 2–4.30am on 18 December 2002.

[152] On 24 August 2009 this court had unanimously dismissed the appeal.

[153] I shall now give my grounds.

[154] The facts of the case, based on the findings of the learned trial judge, are as follows.

[155] On 18 December 2002 the two appellants went to a stall at the Kluang bus station to meet up with one Ibrahim bin Mohd Zain ('PW9'), the owner of the stall. PW9 knew both the appellants; for the appellants came to PW9's stall almost everyday to have drinks for the past one and a half month prior to the incident.

[156] They arrived at PW9's stall at about 2am (18 December). They came to see him at that odd hour of the night (or, rather, early morning — since it was already 2am) to seek his help to recover some money from the deceased, this money being the appellants' share of the proceeds of sale by the deceased of a stolen television. PW9 was told that he would be rewarded if he agreed to assist the appellants (I pause here to remark that this part of PW9's evidence regarding the purpose of the appellants' visit to his stall appears to be accepted by the learned trial judge. However, I have some reservation on this but I will discuss about my reservation at a later part of this judgment).

[157] PW9 have never met the deceased before, but nevertheless agreed to help the appellants. The second appellant then phoned the deceased using a public phone asking the deceased to come over to PW9's stall and thereafter to a place called Taman Desa Harmoni, Kluang, 'to fetch a stolen computer'. Actually there was no stolen computer to fetch at Taman Desa Harmoni. All they wanted was for the deceased to go with them to Taman Desa Harmoni. The idea about the pretext of fetching stolen computer came from the first appellant. About ten minutes later the deceased arrived at PW9's stall in a Kelisa car bearing registration No JGL 8059. The appellants and PW9 got on board the car driven by the deceased. PW9 sat at the back, on the left; whilst the second appellant sat on the right. The first appellant sat in front next to the deceased. Before this meet up, PW9 had not known the deceased. So, inside the car, PW9 was introduced to the deceased.

[158] Of the four, PW9 was the oldest. He was 37. The first appellant was 19, and the second appellant was 18. The deceased was 27.

[159] About ten minutes later, they arrived at Taman Desa Harmoni. The first appellant showed the way to where the 'stolen computer' was. They had to drive downhill, on a partly tar and partly laterite road. The car eventually stopped at an isolated spot surrounded by undergrowths and empty housing lots. There were lights coming from a nearby house and also from a nearby school.

[160] When the car stopped, the first appellant got out of the vehicle on the pretext of fetching the 'stolen computer'. The second appellant and PW9 also got down from the car. The deceased remained inside the car. The second appellant and PW9 waited near the upper edge of a slope while the first

appellant went down the slope into some bushes pretending to search for the 'computer'. The first appellant then called out to PW9 to ask the deceased to come out of the car to 'help carry the computer'. PW9 did as told. The deceased got down from his car, went to the back of the car and leaned on the car boot. PW9 went over to the deceased, touched his right shoulder with his right hand and told the deceased that actually there was no computer and that they had taken him to that place to be asked about the money (the appellants' share from the sale of the stolen television) that he was supposed to give to the appellants. The deceased on being asked, just kept quiet. At that point of time, the first appellant was about 5–8 feet away from where PW9 was. PW9 did not see the second appellant then. PW9 then asked the deceased a second time about the money. As he was asking the deceased, he saw the second appellant who was then on his right swinging a baseball club at the deceased's head. PW9 tried to prevent the second appellant from bashing the deceased's head with the club but was in vain. The club not only hit the deceased's head, it also hit PW9's right wrist. PW9 was in great pain so much so that he squatted to grapple with the pain. Then when PW9 lifted his head to look up he saw both the appellants attacking the deceased. He saw the second appellant was still striking the deceased with the baseball club, while the first appellant was striking the deceased with a *parang*. The baseball club was about two feet long, while the *parang* was almost as long. The baseball club was taken by the second appellant from underneath the driver's seat of the deceased's car. Earlier, when he was about to get out of the car, PW9 saw the second appellant taking out the baseball club from underneath the car seat; and the deceased did not know of this. But PW9 did not know from where the first appellant got the *parang*. PW9 saw the appellants striking the deceased with the club and the *parang* about five to six times. The deceased was struck at the head and body (at the sides and back part of the body). The deceased tried to defend himself but was helpless as the appellants went all out to attack him. PW9 then got up went towards the appellants and shouted at them to stop attacking the deceased. They stopped. The deceased fell to the ground and lay motionless. His head was covered with blood. PW9 panicked and told the appellants to run away from the scene. Before departing, one of the appellants took a wallet from the right pocket of the deceased's trousers. The appellants and PW9 got onto the deceased's car and drove off, with the first appellant driving. PW9 sat at the back while the second appellant sat in front next to the first appellant. The appellants sent PW9 back to his stall at the Kluang bus stand. While in the car, PW9 asked the appellants as to why they had been so heartless as to injure the deceased so severely. The appellants just kept quiet. They arrived at PW9's stall at about 3–4am. PW9 got down from the car, but as he was getting down he saw the appellants opening and searching the contents of the deceased's wallet. The appellants found a handphone in the deceased's car and they gave it to PW9. After dropping PW9, the appellants drove off. The first appellant told PW9 that they were going to Kuala Lumpur to run away. However, about 5 or 6am the same morning the appellants returned to PW9's stall in the deceased's

car to inform PW9 that the deceased had died. And they drove off. Later in the afternoon the appellants came again to PW9's stall, still using the deceased's car, just to meet up. They talked about the incident.

[161] About three days later, the appellants once again came to PW9's stall. They came at about 5am. They came walking. The first appellant asked PW9 to drive the deceased's car to take them to a shop that buys computers for they had a stolen computer to sell. PW9 obliged the appellants. They drove to Rengit, Batu Bahat. They arrived at Rengit at about 6 in the morning. When they arrived at the shop, they found that the owner of the shop was not in the shop. So they waited in the car. But while waiting, two police officers, namely, Cpl Mahat ('PW8') and Sgt Major Harun (now deceased) came to the car. The police officers saw the computer in the car. They were suspicious. They detained the appellants and PW9 together with the car and the computer, and took them to Rengit police station where they were arrested and placed in the lock up.

[162] According to the government pathologist, Dr Shahidan bin Mohd Noor (PW14), the deceased died due to severe internal head injuries and the injuries could have been caused by blows from a hard blunt object. According to PW14, the impact of the blows must have been very hard as there was a severe depressed fracture at the deceased's skull.

[163] According to PW14 it was possible for the injuries to the head to have been caused by an object such as a baseball club.

[164] The baseball club was never found by the investigating officer. Hence, at the trial it was never produced to the court.

[165] In addition there were also incised wounds at the back of the head and at the back of the deceased's body. According to PW14, these incised wounds, although could have been caused by a *parang*, nevertheless, could not have been caused by the *parang*, exh P6A; for if exh P6A had been used in the assault the incised wounds would have been deeper. But PW9 had identified exh P6A as the *parang* that was used by the first appellant to strike at the deceased. Exhibit P6A was recovered by the investigating officer, C/Insp Md Shah (PW13), in the course of his investigation on 24 December 2002, at a river bank in a palm oil estate at Jalan Kampong Gajah Kahang Timor, about 4km away from Kluang town.

[166] According to the chemist report (P38) there were blood stains on the *parang*, exh P6A. The blood stains were of the type group B, the type similar to that of the deceased's blood. The learned trial judge made a finding that, based on the chemist report, the evidence of PW14 (that incised wounds were found

on the head and body of the deceased) and PW9's own evidence, the incised wounds were caused by the *parang*, exh P6A. I accept this finding.

[167] The dead body of the deceased was first discovered by a group of ladies at about 6am. They happened to be jogging in Taman Desa Harmoni in the early morning of 18 December 2002. They immediately went to a nearby house — the house of one Hj Ahmad bin Samsuri ('PW4') and reported to the latter what they saw. PW4's house was located just about 500 meters away from where the deceased's body was found. On being informed, PW4 immediately went to the scene, and he saw the body of the deceased, which was by the side of Jalan Pisang Raja Udang. PW4 saw the deceased's body covered with blood slumped against the lower part of a slope that was covered with undergrowths. He immediately went to Kluang police station to lodge a report. The report was lodged at around 7am the same morning. The investigating officer, one C/Insp Md Shah ('PW13') arrived at the scene at about 8.15am.

[168] Around noon on 21 December 2002 the appellants and PW9, while they were in the town of Rengit, in the deceased's car, were arrested by two police officers, namely, PW8 and Sgt Major Harun. But, initially, they were not arrested for the murder of the deceased. They were arrested on the suspicion of having committed the offence of being in possession of a stolen computer.

[169] Subsequently, at 10am on 24 December 2002, the appellants and PW9 were handed over to, and came under the custody of, the investigating officer, PW13.

[170] On the same day (24 December 2002), PW13 in the course of his investigation into the murder of the deceased, found three floor mats belonging to the car of the deceased at a rubbish dump in Kampung Melayu, Kluang. This rubbish dump is about 5km away from where the deceased's body was found.

[171] In the present case, the learned trial judge had made a finding that PW9 was a credible witness and that he was not an accomplice.

[172] He also made a finding that the cause of death of the deceased was due to the severe internal head injuries and that those injuries were caused by hard blows to the head of the deceased inflicted by the second appellant using a baseball club.

[173] The learned trial judge further made a finding that several incised wounds found on the deceased's body were caused by the *parang* (exh P6A) that was used by the first appellant to attack the deceased.

[174] At the close of the case for the prosecution, the learned trial judge made a finding that the prosecution had succeeded in establishing a prima facie case on the charge of murder against the appellants.

[175] I accept these findings — except the learned trial judge's finding that PW9 was not an accomplice.

WAS PW9 AN ACCOMPLICE?

[176] It is the contention of the appellants that PW9 was an accomplice. But the respondent/prosecution contends otherwise.

[177] The burden of proof is on the prosecution to establish beyond reasonable doubt that PW9 was not an accomplice (*The Proof of Guilt* by Glanville Williams, (3rd Ed), 1963, London: Stevens & Sons at p 144).

[178] The learned trial judge's finding is that PW9 was not an accomplice on the grounds that PW9 did not participate when the appellants assaulted the deceased with the baseball club and *parang*.

[179] In my judgment, and with respect to the learned trial judge, applying the principles as enunciated in *Harcharan Singh & Anor v Public Prosecutor* [2005] 1 MLJ 593; [2005] 1 CLJ 11 to the facts of the present case, PW9 was an accomplice of the accused. In my view, it is fair to infer that there was a prearranged plan by the appellants to harm the deceased at the isolated spot at Taman Desa Harmoni where they had taken the deceased to, and in all likelihood PW9 knew about this plan. This inference (that there is the likelihood of knowledge on the part of PW9) is based on the following facts or considerations:

(a) The appellants and PW9 jointly had lied to the deceased (about fetching a stolen computer at Taman Desa Harmoni) so as to lure the deceased to the isolated spot in question at Taman Desa Harmoni. To my mind, it is hard to believe that the deceased was taken all the way there under a pretext by them just to be asked by PW9 about the appellants' share of the money. If their purpose was only to ask about the money, as alleged by PW9, then why did the three of them took all the trouble to bring the deceased to that isolated spot and at such an odd hour of the night? Couldn't they just invite the deceased to come to PW9's stall or to any other normal place, say, in the deceased's car, and to discuss about the money?

(b) If, indeed, the deceased had been lured to Taman Desa Harmoni purely to be asked about the appellants' share (of the money), why didn't the appellants give the deceased a chance to answer PW9's question

pertaining to the same? Why did they viciously and mercilessly attack the deceased with a baseball club and a *parang* when PW9 was still in the midst of asking the deceased about the money?

(c) If, indeed, the brutal assault on the deceased was not planned, why is that it did not bother or trouble PW9 when, while alighting from the car, he saw the second appellant taking the baseball club from underneath the driver's seat (and without the knowledge of the deceased)? Why did PW9 choose just to keep quiet? Why didn't he at the very least ask the second appellant as to why he was taking the baseball club with him? The appellants and PW9 went to Taman Desa Harmoni, bringing along the deceased with them, for (supposedly) the purpose of asking about the appellants' share of the money, and — obviously, of course — not to play baseball. Nor were they anticipating anyone coming to that spot that night to harm them (and so there was no need to be armed with anything that could be used as a weapon).

(d) It appears from the evidence of PW9 that while he went to Taman Desa Harmoni with the appellants and the deceased just for the purpose of asking the deceased about the money, the appellants, however, unbeknown to PW9, actually went for a different purpose: to assault the deceased (to my mind, what the appellants did in attacking the deceased with the baseball club and the *parang* was not something that merely happened at the spur of the moment). In other words, PW9 by his own evidence is implying that he, just like the deceased, was also tricked by the appellants into going to Taman Desa Harmoni. But if, indeed, he was so tricked by the appellants, why is it that he was not angry with the appellants for having tricked him and getting him involved with a serious crime of homicide? All that he said in evidence was:

> Mereka hantar saya balik ke Stesyen Bas Kluang. Dalam perjalanan saya tanya kenapa tergamak pukul [Azley] begini. Mereka senyap sahaja.

Why did he without hesitation accept the deceased's handphone when the appellants gave it to him? The pertinent question is: was PW9 *in fact* tricked by the appellants as to the purpose of going to Taman Desa Harmoni with the deceased, as he appears to be suggesting? In my judgment, contrary to PW9's suggestion, I do not think he was tricked; for, in terms of age, being 37, he was far more matured than the appellants who were then still in their teens. Furthermore, he was not angry with the appellants for having tricked him (if, indeed, he was tricked) and for having involved him in a heinous crime. He did not report the matter to the police after the incident; nor distanced himself from the appellants. Instead, without feeling any sense of guilt, shame or remorse, he, not only continued to associate himself with the appellants, but also, without any hesitation, accepted the deceased's handphone when the appellants gave it to him, and which he eventually sold; and he also readily agreed to drive the appellants in the deceased's car to Rengit for the purpose of

selling a stolen computer. In my judgment, the truth of the matter is that PW9 *knew* the real purpose of going to Taman Desa Harmoni: to harm the deceased. That is why it did not appear odd to him when he saw the second appellant bringing out the baseball club from the car. And that is also why he was not angry with the appellants for what had happened. And that is also why he accepted the handphone from the appellants without any hesitation. But what he did not expect was the extent or gravity of the harm inflicted by the appellants on the deceased and the consequences. And this appears to be revealed by his evidence:

> Dalam perjalanan saya tanya kenapa tergamak pukul [Azley] *begini*. (Emphasis added.)

But this must mean that PW9 had not been truthful when he told the court that he did not know at all that the appellants were going to harm the deceased. But a court must not reject the evidence of a witness in its entirety just because the witness is found to be not truthful in some aspects of his evidence. The court must evaluate the evidence of the witness in its entirety. If the court, in evaluating the evidence of the witness in its entirety, nevertheless, finds him to be a credible witness, except with regard to some portions of his evidence, then those parts of his evidence which the court finds to be credible, must be accepted by the court.

ARE THERE CORROBORATIVE EVIDENCE?

[180] I shall begin with the legal principles pertaining to the evidence of an accomplice. I shall begin with s 133 of the Evidence Act 1950. This provision states:

> 133 Accomplice
>
> An accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice.

[181] Then we have s 114, illustration (b) of the Evidence Act that provides for a presumption in relation to the evidence of an accomplice:

> 114 Court may presume the existence of certain fact
>
> The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and privates business, in relations to the facts of the particular case.

ILLUSTRATIONS

The court may presume —

(b) that an accomplice is unworthy of credit unless he is corroborated in material particulars;

[182] The above codified principles of the law of evidence are complemented by certain principles of English common law. Firstly, there is the principle that the evidence of an accomplice must be corroborated in some material particulars by the evidence of an independent witness (or witnesses).

[183] The law is clearly expressed by *Sarkar's Law of Evidence*, (16th Ed), 2007 at p 2245:

> (3) That although the uncorroborated testimony of an accomplice is strictly admissible, and a conviction based on it is not illegal, yet experience teaches us that an accomplice being always an infamous person, it is extremely unsafe to rely upon his evidence unless it is materially corroborated, and that it is the long established and universal practice both in India and England for judges to guard their minds carefully against acting upon such evidence when uncorroborated. The rule as to corroboration has become a settled rule of practice of so universal an application that it has now assumed the force of a rule of law.

[184] The corroborative evidence must also implicate the accused (not necessarily directly; it could even be indirectly) with the particular crime in question.

[185] Perhaps the best definition of corroborative evidence can be found in the judgment of Lord Reading CJ in the English Court of Criminal Appeal case of *The King v Baskerville* [1916] 2 KB 658. It is as follows (see p 667):

> We hold that evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it. The test applicable to determine the nature and extent of the corroboration is thus the same whether the case falls within that class of offences for which corroboration is required by statute. The language of the statute, 'implicates the accused', compendiously incorporates the test applicable at common law in the rule of practice. The nature of the corroboration will necessarily vary according to the particular circumstances of the offence charged. It would be in high degree dangerous to attempt to formulate the kind of evidence which would be regarded as corroboration, except to say that corroborative evidence is evidence which shows or tends to show that the story of the accomplice that the accused committed the crime is true, not merely that the crime has been committed, but that it was committed by the accused.

[186] And what amounts to corroboration was clearly explained by Sharma J in *Attan bin Abdul Gani v Public Prosecutor* [1970] 2 MLJ 143.

[187] There is the further principle that if the evidence of the accomplice is not corroborated, the trial judge can still convict the accused. But before doing so, the trial judge must warn himself of the danger of convicting the accused based on the uncorroborated evidence of an accomplice.

[188] As a rule, a conviction must be quashed on appeal if the trial judge fails to warn himself of the danger of convicting an accused on the uncorroborated evidence of an accomplice. However, an appellate court may still uphold a conviction even if the trial judge fails to warn himself of the danger of convicting an accused based on the evidence of an accomplice, where such failure was due to the fact that the trial judge had mistakenly thought that the key witness in question was not an accomplice (and therefore the need for corroborative evidence does not arise), if the appellate court is satisfied that in fact and in law there is evidence that corroborates the evidence of the accomplice which is of such a convincing, cogent and irresistible character. An application of this latter principle by our courts is exemplified by the case of *Jegathesan v Public Prosecutor* [1980] 1 MLJ 165, where Chang Min Tat FJ, in delivering the judgment of the Federal Court said (at p 167):

> In the case under appeal, the learned President had never at any moment warned himself, much less adequately or clearly, that Ramli was an accomplice for the simple reason that he did not think he was.
>
> The learned deputy public prosecutor who responded to the appeal made, if I may without disrespect call it, a last ditch attempt to salvage the conviction. In *R v William Cyril Davies*, the Court of Appeal refused to disturb a conviction based on the evidence of accomplices, where the judge in his summing up to the jury made no single mention of accomplice or corroboration. The jury acquitted the accused on four counts when the case against the accused depended entirely on the evidence of accomplices, but convicted him on the fifth count, where in addition to the evidence of the accomplices there was the evidence of a police officer who saw the envelope containing the money pass to the accused and who shortly afterwards arrested the accused with the envelope on him. It was suggested that the jury might well have thought that there was sufficient corroboration in the evidence of the detective who said he saw the envelope pass. Hewart LCJ said that the question before the court was whether, in the circumstances of the omission of any direction on accomplice evidence, the verdict of guilty on the fifth count amounted to a substantial miscarriage of justice, or, in other words, whether it was clear that the jury would inevitably have arrived at the same conclusion upon that count, if an express direction on the lines laid down in *Baskerville* had been given. On a review of the evidence, the learned Lord Chief Justice found that 'the court is satisfied that however explicit the direction on those lines had been, the jury could not have arrived at any conclusion other than that to which they came' and accordingly dismissed the appeal.

If there had been a fully explicit direction on accomplice evidence and the jury could not have nevertheless arrived at any other conclusion, the verdict would not be disturbed, even if there had been no such direction. The same Lord Chief Justice in *R v Thomas Lewis* at p 113 expressed the proposition thus:

> This court has held more than once that, although the judge omits to give a proper direction, or any directions nevertheless where corroborative evidence exists in the case and is of such a convincing, cogent and irresistible character that it is apparent that the jury, if they had had a proper direction, must inevitably have come to the same conclusion, the omission is not fatal; otherwise it is.

The question in this case thus becomes whether there is corroborative evidence of a convincing cogent and irresistible character.

[189] In the present case, learned counsel for the appellants submits that there was no corroborative evidence.

[190] The learned trial judge, however, did not discuss the issue of corroboration as he was of the view that PW9 was not an accomplice.

[191] In passing, I think, it worthwhile as a matter of interest (and some importance) to point out here that since 1976 the law of evidence of Singapore with regard to the evidence of accomplices has been changed. In that year Singapore introduced some amendments to its Evidence Act. Section 135 of the Evidence Act of Singapore (which prior to the amendments was in pari materia with s 133 of our Evidence Act) now provides:

> Accomplice
>
> 135 An accomplice shall be a competent witness against an accused person; and any rule of law or practice whereby at a trial it is obligatory for the court to warn itself about convicting the accused on the uncorroborated testimony of an accomplice is hereby abrogated.

[192] And illustration (b) of s 116 of the Evidence Act of Singapore (which prior to the amendments was in pari materia with illustration (b) of s 114 of our Evidence Act) now provides:

> (b) that an accomplice is unworthy of credit and his evidence needs to be treated with caution;

[193] And in the United Kingdom, s 32 of the Criminal Justice and Public Order Act 1994 also abrogated the rule which previously required juries to be given warnings (and magistrates to warn themselves) about the danger of relying on the uncorroborated testimony of an alleged accomplice of the accused.

[194] These developments are not surprising; for the accomplice warning rule has resulted 'in a number of guilty defendants getting off on appeal as a result of the trial judge having gone wrong in his direction on the law'. This remark that I have just quoted, and a strong criticism of the accomplice warning rule can be found in Professor Glanville Williams' well known work, *The Proof of Guilt* (see pp 143–168). The learned Professor further wrote:

> How far the rule is a necessary part of the administration of justice, or how far it rests upon an exaggerated apprehension of danger, must be a matter of opinion. The rule is generally thought to rest on the danger that the accomplice may give his evidence out of spite or fear. But that a man who is in the hands of the police will tell a lie merely out of spite seems unlikely. The only possible case that occurs readily to the mind is where D informs against a criminal E, and E, out of spite, alleges that D was also implicated in the crime, when in fact D was not implicated at all, or else was implicated only in some lesser degree of crime. However, the present rule relating to the accomplice warning is not confined to cases where the defendant has informed against the witness who is alleged to have been his accomplice; it applies to cases where there is no apparent reason for any spite existing. The second supposed reason for the accomplice rule, the element of fear, also fails to justify it in its present scope. That a man will lie in order to minimise his own responsibility for the crime is to be expected; yet this may be no reason for distrusting his evidence if the part he played is admitted by all. The present law does not distinguish between cases where the evidence of the accomplice goes to minimise his own guilt, against the contradictory evidence of the accused, and cases where the part played by the accomplice goes without challenge.
>
> It may also be pointed out that there are many circumstances impairing the credibility of a witness, in respect of which there is no fixed rule of law requiring a warning to the jury. Suppose that a witness for the prosecution is a prostitute, or the proprietor of an illegal gaming-house, upon whom the police can exert great pressure if he or she does not give the evidence expected. The unreliability of the evidence of such a person may be far greater than that of an accomplice, who has been convicted and sentenced for his part in the crime before he enters the witness-box. Yet the judge need not give a routine warning in relation to the evidence of the former, as he must in relation to the evidence of the latter.
>
> Look at the matter from another point of view. Granting the risk that an accomplice who gives evidence against the accused may be lying in order to protect himself, one thing at least may be affirmed: there is practically no risk that he was genuinely mistaken as to the identity of his companions in the affair. If one puts aside the possibility of a deliberate lie, and assumes the accomplice's honesty, his identification of the defendant as one of the gang immediately becomes a highly reliable type of identification — immeasurably superior to identification by a witness who saw the criminal only for a few seconds under highly disturbing conditions.
>
> Now there is no rule of law requiring the judge to tell the jury that it is dangerous to act on the uncorroborated evidence of identification given by one who did not know the defendant before the crime. The last type of evidence is freely acted on in the courts, and is frequently the cause of demonstrable miscarriages of justice. Is it not

inconsistent to require the warning in the one case but not in the other? Is not a warning less needed for the evidence of an accomplice who has been convicted and sentenced, and who shows the most complete familiarity with the details of the crime, than it is for the evidence of a bystander whose identification of the accused would be regarded as gravely suspect by every psychologist who has studied the problems of observation and memory?

The only strong argument in favour of requiring the accomplice warning as a matter of routine in criminal trials is that this rule represents the experience and wisdom of the centuries. 'Centuries' is a slight exaggeration, for the rule has been in existence less than two hundred years; but that is a long time. Is it open to anyone to express an opinion adverse to a rule that has been followed by the judges for so long, almost without dissenting voice?

An Englishman is unlikely to be particularly impressed by the observation that the extreme suspicion of accomplice evidence does not appear to be shared by Continental judges. Perhaps more weight will be attached to the fact that during the greater part of the nineteenth century it was regarded as a matter for the discretion of the trial judge whether he administered the accomplice warning to the jury or not. The earliest statement of the judge's discretion in the matter is in 1788, when it was held that a conviction on the uncorroborated evidence of an accomplice was strictly legal, but that the presiding judge might make such observations to the jury as the circumstances of the case might require, to help them in saying whether they thought the evidence sufficiently credible to guide their decision on the case. At about the same time, Perryn B. declared that the practice of rejecting an unsupported accomplice is rather a matter of discretion with the court than a rule of law. This way of putting the matter continued into the next century; but it seems that, while nominally reserving it as a matter of discretion, judges came to give the accomplice warning as a matter of routine.

In the year 1836, Henry Joy, Lord Chief Baron of the Court of Exchequer in Ireland, published a book *On the Evidence of Accomplices* to put forward the proposition that there was no binding rule; and in the course of it he made plain his opinion that it was irrational to reject accomplice evidence merely because of the source from which it came. His words are worth recalling.

How the practice which at present prevails, could ever have grown into a general regulation, must be matter of surprise to every person who considers its nature. Why the case of an accomplice should require a particular rule for itself; why it should not, like that of every other witness of whose credit there is an impeachment, be left to the unfettered discretion of the judge, to deal with it as the circumstances of each particular case may require, it seems difficult to explain. Why a fixed unvarying rule should be applied to a subject which admits of such endless variety as the credit of witnesses, seems hardly reconcilable to the principles of reason. But, that a judge should come prepared to reject altogether the testimony of a competent witness as unworthy of credit, before he had even seen that witness; before he had observed his look, his manner, his demeanour; before he had had an opportunity of considering the consistency and probability of his story; before he had known the nature of the crime of which he was to accuse himself, or the temptation which led to it, or the contrition with which it was followed; that a judge, I say, should come prepared beforehand to advise the jury to reject without consideration such evidence, even

though judge and jury should be perfectly convinced of its truth, seems to be a violation of the principles of common sense, the dictated of morality, and the sanctity of a juror's oath.

The Chief Baron's argument convinced Wigmore, who repeated and underlined it. Wigmore pointed out that the essential reason for distrusting the evidence of the accomplice is that he may have been given a promise of immunity on condition of implicating others; but, said Wigmore, the distrust should be co-extensive with the reason for it, and there is no reason for fixing an invariable rule which is to operate even in cases where no promise of immunity has been given. Also 'credibility is a matter of elusive variety, and it is impossible and anachronistic to determine in advance that, with or without promise, a given man's story must be distrusted'.

This latter opinion, coming from the most weighty exponent of the law of evidence, has been totally disregarded in England; so far as appears, it has never been considered in our courts. Nor has much progress been made in changing the rule in Wigmore's own country. A proposal to repeal the requirement of warning was made in New York, without coming to fruition. But it is significant that the American Law Institute's Model Code of Evidence totally omits the rule.

[195] The learned Professor then proceeded to highlight the House of Lords case of *Davies v Director of Public Prosecutions* [1954] 1 All ER 507 to explain that at times a strict application of the accomplice warning rule could place the court in a dilemma where the application could result in an unwarranted acquittal:

The difficulty of reconciling a strict rule of evidence with the public interest that criminals should be convicted is well illustrated by the Clapham Common stabbing case (Davies), which was taken to the House of Lords. The Lord Chancellor, Lord Simonds, who in effect delivered the judgment of the House, examined two divergent lines of authority in the Court of Criminal Appeal on the corroboration of accomplices. According to some cases, the rule that a judge should warn the jury of the danger of convicting on the uncorroborated evidence of an accomplice is merely a rule of practice, and the absence of warning will not be fatal to the conviction if there is in fact corroborative evidence. According to other decisions of the Court of Criminal Appeal, the rule is one of law, and absence of warning will be fatal even though there is corroborative evidence, unless the court can act under the proviso to s 4(1) of the Criminal Appeal Act 1907 — that is to say, unless the court is of opinion that a reasonable jury would inevitably have arrived at the same conclusion if an express warning had been given. None of these cases was binding upon the House of Lords; but instead of examining which of them laid down the preferable rule, Lord Simonds merely announced that the second and stricter rule had the preponderant weight of authority on its side, and should be adopted.

The effect of the stricter rule in practice depends on how it is interpreted. In the case before him, Lord Simonds reviewed the evidence which showed that the accused youth, Davies, was the only member of the gang who possessed and produced a knife; independent witnesses spoke to this, and there was also evidence of bloodstains in Davies's pocket. This was a considerable body of evidence against

Davies, yet Lord Simonds did not say that it would have been enough to justify an appellate court in acting under the proviso, and dismissing the appeal against conviction, if that question had been in issue. His silence on this may, however, be attributed to the fact that the House discovered another way of dismissing the appeal.

This was by adopting a narrow definition of the term 'accomplice'. The evidence which came under fire on the appeal had been given against Davies by another youth, Lawson, who was a member of the same gang and who had been convicted of common assault for his part in the affair. Lawson had been acquitted of participation in murder, because there was no evidence that he knew that Davies carried a knife. On the trial of Davies for murder, at which Lawson gave evidence for the Crown, the judge did not warn the jury of the danger of convicting on the uncorroborated evidence of an accomplice. The House of Lords nevertheless upheld a conviction, on the ground that no warning was necessary, because Lawson was not an accomplice to the crime charged against Davies, namely murder. He was an accomplice only to the lesser crime of assault.

This decision gives an anomalous result. If Davies had been charged with assault, Lawson would have been an accomplice and a warning would have been necessary. Actually Davies was charged with murder; but this murder was one that contained an assault to which Lawson was a party. It is using little more than a technicality to hold that, in these circumstances, the corroboration rule does not apply.

[196] Back at home in Malaysia, a good and clear example of the difficulty faced by an appellate court in upholding public interest if it were to apply strictly the accomplice warning rule is the Supreme Court case of *Ng Yau Thai v Public Prosecutor* [1987] 2 MLJ 214. In this case, the learned magistrate had convicted the accused based on the uncorroborated evidence of two accomplices. The learned magistrate had acknowledged that they were accomplices. The issue before the Supreme Court was whether the learned magistrate had warned herself of the danger of convicting based on uncorroborated evidence of accomplices. Seah SCJ in delivering the judgment of the court said (at pp 216):

> Now, in his judgment the learned judge did not make any reference to the grounds of decision of the trial magistrate and if he had done so he would have found that the trial magistrate had in mind such warning and this was clearly indicated in her judgment. The trial magistrate said:
>
> PW1 (Thee Sok Len) and his wife PW2 were accomplices. They knew that the sale and purchase of the baby was an offence under the law. Because they were accomplices the court may presume under s 114, illustration (b), of the Evidence Act 1950 that their evidence is unworthy of credit unless they are corroborated in material particulars. The evidence of PW1 cannot be corroborated by the evidence of his wife PW2 because PW2 was also an accomplice.

Then the trial magistrate referred to the following provisions of s 133 of the Evidence Act:

An accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice.

After alluding to a passage in *Sarkar's Law of Evidence* dealing with the subject of evidence of an accomplice and corroboration, the trial magistrate stated that she accepted the evidence of PW1 and PW2, and she gave the reason for doing so as follows:

There is no reason for them (ie PW1 and PW2) to tell lies in court. On the other hand if they tell the truth they themselves stand to lose because they would be ordered to return the baby.

The warning as to the danger of convicting on uncorroborated evidence if the prosecution is relying on the testimony of an accomplice does not involve some legalistic ritual to be automatically recited by the trial magistrate, or that some particular form of words or incantation has to be used and if not used, the judgment is deemed to be faulty and the conviction set aside. There is no magic formula and no set words which must be adopted to express the warning. Rather must the good sense of the matter be expounded with clarity and in the setting of a particular case (see the judgment of Lord Ackner in *R v Spencer and others; R v Smails and others* [1986] 2 All ER 928 at p 937).

Although the answer to the certified question is that the High Court was wrong in law to hold that the warning need not appear in the judgment or grounds of decision of the trial magistrate, however, having regard to what we have stated above, we agree with the learned judge that the appeal be dismissed and the conviction be affirmed.

[197] Did the learned magistrate really warn herself of the danger of convicting based on the uncorroborated evidence of accomplices? With the greatest respect, granting that there is no 'some legalistic ritual' involved in giving the warning to oneself (ie the magistrate), still, for Seah SCJ to say that 'the trial magistrate had in mind such warning' is to confuse between a finding by the learned magistrate that the accomplice witnesses that were before her (PW1 and PW2) were credible witnesses (for the reason which the learned magistrate gave) and an actual warning by the learned magistrate to herself (and there was none in this case) of the danger of convicting on uncorroborated evidence of accomplices.

[198] Perhaps, if I may respectfully suggest, it is high time that our Legislature too considers amending our Evidence Act and doing away with the accomplice warning rule so as to avoid placing appellate courts in difficult

A situations when confronted with the evidence of accomplices and also to minimise any possibility of miscarriage of justice.

[199] Anyway, reverting to the case at hand, with respect, I think, there are independent evidence that corroborate the evidence of PW9 in material B aspects.

[200] The evidence of PW9 is corroborated by the following independent evidence:

C (a) the evidence of PW4 (Hj Ahmad Samsuri — who found the deceased's body and reported to the police);

(b) The evidence of PW5 (Norazafazila bt Mohd Din — the wife of the deceased and the registered owner of the car JGL 8059);

D (c) the evidence of PW8 (Cpl Mahat — who arrested the appellants and PW9 while they were in the deceased's car in Rengit town);

(d) the evidence of PW13 (C/Insp Md Shah, the investigating officer);

(e) the evidence of PW14 (Dr Shahidan — who conducted the E post-mortem);

(f) exh P6A (the *parang*);

(g) exh P38 (the chemist report);

F (h) exh P28 (photographs Nos 6 and 7 of the Kelisa car bearing registration No JGL 8059); and

(i) exhs P12A, P13A and P14A — the three floor mats of the deceased's car.

[201] PW4's and PW13's evidence as to the place where they found the body G of the deceased corroborate PW9's evidence as to where the body of the deceased was left after the assault.

[202] PW5's evidence corroborates PW9's evidence that the car JGL 8059 was used by deceased on the night in question; and also by PW9 and the H appellants in committing the crime. PW5 was the wife of the deceased and was the registered owner of the car. According to her, the last time she was in communication with her husband was on 18 December 2002 — and this was the date of the murder of the deceased. She said her late husband (the deceased) had been using her car. She identified the three floor mats of the car which was I discovered by PW13 (the investigating officer) at a rubbish dump in Kampung Melayu, Kluang about 5km away from the scene of the crime, as belonging to her car.

[203] PW8's evidence of arresting PW9 and the appellants in Rengit town while the three of them were in the deceased's car (the photographs of the car are shown in exh P28 (photographs Nos 6 and 7)), which was then stationary, corroborates PW9's evidence that the deceased's car was used by the three of them on the night of the murder to take the deceased to Taman Desa Harmoni, where the murder took place. But more importantly, the discovery by PW8 of the deceased's car with PW9 and the appellants in it just three days after the incident also corroborates PW9's evidence that implicates the appellants (albeit indirectly) with the murder of the deceased. In *The King v Baskerville* [1916] 2 KB 658 Lord Reading CJ said (at p 667):

> The corroboration need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connection with the crime. A good instance of this indirect evidence is to be found in *Reg v Birkett*. Were the law otherwise many crimes which are usually committed between accomplices in secret, such as incest, offences with females, or the present case, could never be brought to justice.

[204] The discovery of the deceased's car by PW8 with the appellants and PW9 and a computer in it also corroborates PW9's evidence about the appellants returning to PW9's stall and asking him to drive the deceased's car to Rengit for the purpose of selling a stolen computer to a shop.

[205] PW13's evidence as to the discovery of the *parang*, exh P6A corroborates PW9's evidence that the *parang*, exh P6A, was used to attack the deceased.

[206] PW13's evidence of the discovery of three car floor mats (exhs P12A, P13A and P14A) of the deceased's car at a rubbish dump in Kampung Melayu, Kluang, 5km away from the scene of the crime corroborates PW9's evidence that also implicates the appellants in the murder of the deceased, albeit indirectly. It is to be recalled that after the incident the deceased's car was kept by the appellants for three days until they went to see PW9 again on the 21 of December. It can be inferred that it was the appellants who had thrown away the three floor mats at the rubbish dump. But why must they throw away the floor mats at the rubbish dump? There must be some ring of truth in PW9's evidence that implicates the appellants. It is to my mind fair to infer that the reason as to why the floor mats were thrown away by the appellants must be because, after the Taman Desa Harmoni incident, the appellants wanted to ensure that any possible evidence (like traces of mud or blood) that might link them with the murder of the deceased were removed.

[207] The expert medical evidence of PW14 describing the nature and extent of the injuries found on the head and body of the deceased corroborates PW9's evidence that a baseball club and a *parang* were used to attack the deceased.

[208] The chemist report P38 showing blood stains of type group B (the same blood type of the deceased) on the *parang* exh P6A corroborates PW9's evidence that the *parang* (exh P6A) was used in the attack on the deceased.

WAS THERE A COMMON INTENTION?

[209] Section 34 of the Penal Code provides:

> Section 34 Each of several persons liable for an act done by all, in like manner as if done by him alone.
>
> When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act were done by him alone.

[210] In *(1) Namasiyiam (2) Rajindran (3) Goh Chin Peng, and (4) Ng Ah Kiat v Public Prosecutor* [1987] 2 MLJ 336; [1987] 1 CLJ 540, Syed Agil SCJ, in delivering the judgment of the Supreme Court said (at p 549):

> In law, common intention requires a prior meeting of the minds and presupposes some prior concert. Proof of holding the same intention or of sharing some other intention, is not enough. There must be proved either by direct or circumstantial evidence that there was: (a) a common intention to commit the very offence of which the accused persons are sought to be convicted; and (b) participation in the commission of the intended offence in furtherance of that common intention.
>
> Where the prosecution case rest on circumstantial evidence, the circumstances which are proved must be such as necessarily lead only to that inference. Direct evidence of a prior plan to commit an offence is not necessary in every case because common intention may develop on the spot and without any long interval of time between it and the doing of the act commonly intended. In such a case, common intention may be inferred from the facts and circumstances of the case and the conduct of the accused. (*The Supreme Court (of India) on Criminal Law*, 1950–1960 by JK Soonavala at pp 188–193).

[211] It is the contention of the appellants' counsel that there was no common intention between the appellants as there was no evidence of 'some prior concert'.

[212] The learned DPP contends otherwise, pointing to the act of tricking and luring the deceased to the isolated spot in question and the manner the appellants attacked the deceased.

[213] In my judgment, the learned trial judge was correct in making a finding that there was common intention within the meaning of s 34 of the Penal Code. It is, however, true that there was no direct evidence of a prior planning to seriously injure the deceased with a baseball club and a *parang*. But in law there need not have to be direct evidence: the evidence can be circumstantial. And there are circumstantial evidence of a common intention to seriously injure the deceased with a baseball club and a *parang*: the luring of the deceased to an isolated spot through trickery at an odd hour past midnight; the manner in which the appellants all of a sudden and, without any provocation, mercilessly and brutally attacked the deceased with a baseball club and a *parang*; and the subsequent conduct of the appellants. All this goes to show that as between the appellants there was a prior plan of an intention to cause serious injuries to the deceased using a baseball club and a *parang*. It can be fairly inferred that the appellants came to the spot well prepared to seriously injure the deceased with a baseball club and a *parang*. The appellants had knowledge of the existence of the baseball club underneath the driver's seat. As for the *parang*, it was a fact that it was used by the first appellant when he attacked the deceased but that PW9 did not see anyone bringing the *parang* when getting into the car or when alighting from the car. Considering that PW9 did not know where the first appellant obtained the *parang*, so there are three possibilities: (1) the *parang* could have been brought secretively by the appellants as they board the deceased's car without the knowledge of PW9 or the deceased; or (2) the *parang* was already there in the deceased's car and the appellants knew about it but not PW9; or (3) the *parang* was secretively placed at the scene beforehand by the appellants, that is to say, it was already placed there before the appellants brought PW9 and the deceased to the scene.

WAS THE BODILY INJURY SUFFICIENT IN THE ORDINARY COURSE OF NATURE TO CAUSE DEATH?

[214] Section 300 limb (c) of the Penal Code provides:

> 300 Murder
>
> Except in the cases hereinafter excepted, culpable homicide is murder —
>
> (c) if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death;

ILLUSTRATIONS

(c) *A* intentionally gives *Z* a sword-cut or club wound sufficient to cause the death of a man in the ordinary course of nature. *Z* dies in consequence. Here *A* is guilty of murder, although he may not have intended to cause *Z*'s death.

[215] That the acts of the appellants in brutally attacking the deceased with the baseball club and *parang* were done with the intention of causing serious bodily injuries to the deceased is beyond doubt. But are the bodily injuries inflicted on the deceased by the appellants sufficient in the ordinary cause of nature to cause death? Based on the evidence of PW14, particularly, pertaining to the extent of the fracture of the skull, the seriousness of the internal head injuries, and the cause of death, the answer to this question is obviously in the affirmative. Hence, in my judgment, the learned trial judge made a correct finding that the mens rea of the appellants falls within limb (c) of s 300 of the Penal Code.

THE DEFENCE

[216] Both the accused elected to give evidence on oath. Their defence is essentially that of the right of private defence under Exception 2 to s 300 of the Penal Code (I shall not be referring to ss 96 and 97 of the Penal Code as these provisions are not relied upon by the defence).

[217] I shall begin with the evidence of the first appellant, Mahadzir. He said in evidence that prior to the incident he had known the deceased for about six months. The deceased and he used to discuss about robberies and distribution of stolen goods.

[218] He also knew PW9. He had known PW9 about seven to eight months prior to the incident. He used to meet PW9, whom he called 'Yim', at the Kluang bus stand to buy drugs.

[219] He said on the night of 17 December 2002 he went with the second appellant, Anuar, to see PW9 at the Kluang bus stand to buy drugs as he was a drug addict. He obtained the ganja and heroin that he needed from PW9. He took the drugs at PW9's stall and spent time there. PW9 observed that he and the second appellant seemed to be having a problem. PW9 asked the appellants whether they had any problem. The first appellant told PW9 that he and the second appellant had been cheated by the deceased. PW9 then asked the second appellant to phone the deceased to come over to his stall so that he

could settle the problem for them. PW9 said half of the money that the appellants would get from the deceased should be given to him for his effort in getting the deceased to pay the appellants. The second appellant phoned the deceased using a public phone. Ten minutes later the deceased arrived at PW9's stall in a car with registration No JGL 8059. According to the first appellant, the deceased knew how to get to PW9's stall as the deceased knew PW9. Then the appellants and PW9 got into the car of the deceased. The first appellant sat in front next to the deceased, who was driving the car. The second appellant and PW9 sat behind with the second appellant sitting behind the first appellant and PW9 sitting behind the deceased. The deceased asked where they intended to go. PW9 replied that they intended to go to the 'usual place'. The appellants and the deceased knew what PW9 meant as 'the usual place'. It was an isolated spot in Taman Desa Harmoni where the four of them used to hide stolen goods. On arriving at the isolated spot at Taman Desa Harmoni, all the four of them alighted from the car. While getting out of the car, the first appellant saw the deceased taking out a baseball club and a *parang* and placing them on the driver's seat. All the four then went to the back of the car. The deceased and PW9 leaned against the car boot. The first appellant was standing facing the two of them. Then PW9 placed his hand (he did not say which hand) on the deceased's shoulder (he did not say which shoulder) and asked the deceased about the money. The deceased all of a sudden became angry because none of them was siding with him; and he swung the baseball club hitting PW9's hand. At that moment the first appellant was standing in front of the deceased, while the second appellant was standing on his (the first appellant's) left. Then PW9 pushed the deceased and he fell near the edge of the road, and the deceased's head hit the ground. Then there was a scuffle between the deceased and PW9 that lasted for about two minutes resulting in the deceased falling to the ground; and when the deceased fell the second appellant snatched the baseball club from the deceased. The first appellant only observed what happened. He did not do anything.

[220] According to the first appellant's evidence, the deceased then got up and straight away went to the driver's seat of the car and there he took out the *parang* mentioned earlier. The first appellant warned the second appellant that the deceased had a *parang* with him. The deceased having taken the *parang* attacked the second appellant with the same. At this moment PW9 was at the back of the car in a sitting position struggling with the pain at his right wrist. The second appellant, meanwhile, used the baseball club to defend himself. The second appellant swung the baseball club thrice and one of the blows struck the deceased's head. The deceased, however, continued to strike at the second appellant with the *parang*, and the latter was avoiding the blows. Then the second appellant punched the deceased's left eye and the deceased fell to the

ground and passed out. The first appellant then took the *parang* from the deceased. PW9 took from the deceased, who was unconscious, a wallet, a handphone and a set of car keys and told the appellants to run. They all got into the deceased's car. PW9 drove the car. In the car, the first appellant sat next to PW9 and the second appellant sat at the back. They brought with them the baseball club and the *parang*. In the car PW9 gave the wallet to the first appellant but kept the handphone with him. They returned to the Kluang bus stand. On arriving there, PW9 got down from the car and asked the appellants to return to the scene to find out whether the deceased was dead or was only unconscious. The appellants went back to the scene. The first appellant used the *parang* to touch the deceased's body. They saw that the deceased was lying on the ground and motionless, with his face and body facing downwards. The first appellant said he was certain that the deceased was dead. Then the appellants went back to the bus stand to inform PW9 that the deceased was dead. PW9 then asked the appellants to throw the baseball club and the *parang* into a river. They did as told and thereafter the first appellant went home. He, however, did not bring the car home but left it at Kampung Melayu. Before leaving the car he saw a lot of mud on the floor mats of the car. So he took out the floor mats and threw them somewhere near the place where he had left the deceased's car and went home to his flat at Flat Hj Manan which was ten minutes walk from the place where he had left the car. But he took the car keys with him. He did not know where the second appellant went after he and the second appellant had left the car.

[221] The first appellant had known the second appellant since childhood. They were close friends. They often went stealing together.

[222] In summary, according to the first appellant he was only an onlooker at the time of the scuffle and attack that resulted in a tragic end. The attacker, according to him, was the deceased. The deceased had attacked PW9 with a baseball club; and the deceased had attacked the second appellant with a *parang*; and that when the second appellant struck the blows at the deceased with the baseball club, he was only acting in self defence.

[223] Now, I turn to the evidence of the second appellant. According to the second appellant he and the deceased used to commit robberies and burglaries together; and that he, the deceased and the first appellant used to meet up. He knew PW9 as the latter used to supply drugs to him and the first appellant, and they used to frequent PW9's stall at the Kluang bus stand. He said that around midnight on 17 December 2002 he and the first appellant went to PW9's stall to obtain ganja and heroin. The second appellant confirmed that PW9 asked him to phone the deceased and that he did so as asked, calling the deceased to come over to PW9's place.

[224] According to the second appellant, at the isolated spot in question in Taman Desa Harmoni all the four of them got out of the car and went to the back of the car. As they got out of the car, the deceased carried with him a baseball club. Then PW9 touched the deceased's shoulder and said to him:

Macam mana duit yang Azley sudah bawa lari.

[225] And PW9 further said:

Kami datang sini bukan nak gaduh tapi berbincang.

[226] The deceased, however, became angry and he hit PW9 with the baseball club. It hit PW9's hand. Then a scuffle took place between the deceased and PW9. PW9 pushed the deceased and the deceased fell and the second appellant grabbed the baseball club from the deceased.

[227] Then the deceased got up, went to the car to the driver's seat, and took a *parang* and attacked the second appellant with it. The second appellant used the baseball club to defend himself against the *parang* attack. In defending himself, he hit the deceased's head with the baseball club. The deceased then attacked him again with the *parang* and he again hit the deceased's head with the club. He also punched the deceased's left eye. The deceased fell to the ground. The first appellant then came and took away the *parang* from the deceased. While the deceased was lying on the ground, PW9 took a wallet, a handphone and a set of car keys from the deceased's trousers pocket. PW9 then told the appellants to run away. The three of them got into the deceased's car and left the place. PW9 drove the car. They went to PW9's stall at the bus stand. When they dropped PW9 at his stall, the latter asked the appellants to go again to the scene to find out whether the deceased was still alive or had died. The appellants did as asked and found that the deceased had died. They returned to the bus stand and reported back to PW9 who then asked them to throw away the baseball club and the *parang* into a river. The second appellant did as told. Then they left the car somewhere near PW9's stall. Before leaving the car, they saw some blood stains in the car. The first appellant took out the floor mats and threw them into some bushes near PW9's stall. After that they left the car. The first appellant, however, kept the car keys.

[228] In summary, the second appellant maintained (and this aspect of the narration appears to be similar to that of the first appellant) that it was the deceased who attacked PW9 with a baseball club and who attacked him (second appellant) with a *parang*; and he had hit the deceased's head twice with

the baseball club in self defence. He supported the first appellant's version that the first appellant was throughout only an onlooker.

[229] The learned trial judge made a careful evaluation of the appellants' evidence and came to the conclusion that the defence had failed to establish the defence of right of private defence of persons within the context of Exception 2 to s 300 of the Penal Code.

[230] Exception 2 to s 300 of the Penal Code provides:

> *Exception 2* — Culpable homicide is not murder if the offender, in the exercise in good faith of the right of private defence of person or property, exceeds the power given to him by law, and causes the death of the person against whom he is exercising such right of defence, without premeditation and without any intention of doing more harm than is necessary for the purpose of such defence.

[231] The learned trial judge in his grounds of judgment states:

> Tugasan mahkamah sekarang adalah untuk meneliti sama ada fakta dan keterangan-keterangan yang wujud membuka ruang kepada OKT-OKT untuk menggunakan faedah di bawah Kecualian 2 kepada s 300 Kanun Keseksaan untuk mewajarkan tindakannya ke atas si mati di sisi undang-undang. Beban untuk menunjukkan bahawa kecualian tersebut adalah terpakai adalah di atas bahu pihak pembelaan. Beban ini tidaklah berat, cuma atas imbangan kebarangkalian sahaja.

[232] The learned trial judge states the law correctly as to the burden of proof as well as to the standard of proof. As to the burden of proof, the legal burden is on the appellants to satisfy the court that they are entitled to rely on Exception 2 to s 300 of the Penal Code. As to the standard of proof, the appellants have to satisfy the court on a balance of probabilities.

[233] The learned trial judge had carefully considered and analysed the appellants' evidence and had come to the following findings. The learned trial judge found:

> Saya juga mendapati sukar untuk menerima keterangan kedua-dua OKT bahawa ketika keluar daripada kereta, si mati turut membawa kayu baseball dan parang berkenaan di mana kayu baseball dibawa bersama ke tempat dia bersandar pada kereta manakala parang tersebut diletakkan di tempat duduk pemandu. Ini adalah kerana keterangan menunjukkan tidak ada sebab bagi si mati mencurigai tindakan kedua-dua OKT hingga mewajarkan si mati bersiap sedia dengan senjata-senjata berkenaan untuk menghadapi sebarang kemungkinan dari tindak balas kedua-dua OKT. Seperti dinyatakan dalam perenggan-perenggan yang terdahulu si mati menerima dengan baik jemputan OKT kedua untuk keluar malam itu bagi mengambil komputer curi, walaupun hari telah lewat malam. Perjalanan dari Stesyen Bas Kluang ke tempat kejadian juga berjalan dengan aman tanpa

pertengkaran atau kekecohan. Keadaan juga masih aman ketika keempat-empat mereka pada akhirnya keluar daripada kereta. Dengan itu tidak ada sebab bagi si mati menaruh sebarang syak wasangka terhadap kedua-dua OKT mahupun SP9.

[234] In other words, to the learned trial judge, the appellants' evidence that upon getting down from the car the deceased brought out the baseball club and the *parang*, simply does not make sense; for there was simply no reason for him to do so.

[235] And the learned trial judge also made a finding that the appellants' evidence that the second appellant in striking at the deceased's head with the baseball club was only acting in self defence, and that the first appellant was only an onlooker, is not supported by the expert medical evidence of PW14 in view of the number of the injuries and the severity of the same. In the words of the learned trial judge:

Keterangan perubatan juga tidak menyokong keterangan kedua-dua OKT malah lebih memihak kepada keterangan SP9. Laporan post mortem yang dikendalikan oleh pakar patologi SP14 telah dikemukakan dan ditanda sebagai P40. Seperti dalam P40, SP14 telah mengesan 23 kecederaan luaran pada tubuh badan si mati. Kecederaan ini terdapat pada kepala, muka dan tubuh badan. Sifat dan taburan kecederaan ini menyokong keterangan SP9 yang menyatakan semasa pukulan-pukulan dibuat oleh OKT pertama dan OKT kedua, si mati berada dalam kedudukan mencangkung/membongkokkan badan dengan kedua belah tangannya melindungi bahagian kepala. Kecederaan-kecederaan ini menunjukkan si mati tidak berbuat apa-apa melainkan hanya melindungi dirinya. Sifat dan taburan kecederaan si mati menunjukkan kejadian tidak berlaku seperti naratif OKT pertama dan OKT kedua. Sekiranya benar apa yang dikatakan oleh OKT kedua bahawa beliau cuma memukul si mati dua kali sahaja, yang mana selepas pukulan kedua si mati terus jatuh dan tidak bergerak, pastinya pada tubuh si mati akan hanya terdapat dua kecederaan di kepala. Tetapi kecederaan seperti direkodkan dalam P40 menunjukkan terdapat 23 kecederaan luaran tubuh badan si mati. Ini dengan sendirinya mendedahkan 'falacies' keterangan-keterangan kedua-dua OKT.

[236] In my judgment, on the evidence, the above analysis and findings of the learned trial judge that the defence had failed to establish the defence of right of private defence under Exception 2 to s 300 are correct, sound and justified. I am in agreement with his findings.

[237] The learned trial judge also did consider as to whether the defence had, at the very least, succeeded in raising a reasonable doubt against the prosecution case. I am in agreement with him that the defence had not succeeded in doing so. The learned trial judge had correctly concluded that the prosecution had proved its case beyond reasonable doubt.

[238] The conviction and sentence must, therefore, be upheld.

Appeal dismissed.

Reported by Kanesh Sundrum